



Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship


3-2012

Exactions for the Future

Timothy M. Mulvaney

Texas A&M University School of Law, tmulvaney@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>

 Part of the [Constitutional Law Commons](#), [Land Use Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Timothy M. Mulvaney, *Exactions for the Future*, 64 Baylor L. Rev. 511 (2012).

Available at: <https://scholarship.law.tamu.edu/facscholar/434>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

EXACTIONS FOR THE FUTURE

Timothy M. Mulvaney*

I.	Exactions' Place.....	516
A.	The Prelude to Exaction Takings	516
B.	Exaction Takings.....	518
II.	Relying on Exactions to Prepare for Future Contingencies...	521
A.	Nollan and Dolan: Exactions for the Present and the Future	522
B.	Hypothetical Exactions for the Future	523
C.	Challenges to Imposing Exactions for the Future	526
III.	Exactions for the Future as Takings.....	529
A.	The Relevance of Comprehensive Land-Use Planning in Takings Law.....	529
1.	Planning and Regulatory Takings.....	530
2.	Planning and Eminent Domain	531
3.	Planning and Exaction Takings	533
4.	Planning and Takings Cases Involving Exactions for the Future.....	540
B.	Delineating Takings and Due Process Review	543
1.	Early Due Process and Takings Fusion	543
2.	The Due Process Footing of Exaction Takings Jurisprudence	549
3.	The Due Process-Takings Distinction and Exactions for the Future.....	551
IV.	Exactions for the Future: An Alternative Model	554
A.	Temporal Segmentation in the Context of Exactions.....	556
1.	Land Assembly	559

*Associate Professor of Law, Texas Wesleyan University School of Law. Thank you to John Echeverria, Mark Fenster, Keith Hirokawa, Howard Katz, John Martinez, Jessica Owley, Andrew Schwartz, Daniel Siegel, and Laura Underkuffler for their insightful comments on earlier drafts of this manuscript. This article also greatly benefitted from the advice and recommendations provided at a faculty colloquium at Stetson University College of Law. In addition, I am grateful for the fine research assistance of Timothy King, James Parsons, and Creecy Richardson.

2. Forecasting Uncertainty	560
3. Costs.....	561
B. Disadvantages of Temporal Segmentation in the Exactions Realm.....	563
1. Spoliation	563
2. “Enforcing” the Future Interest.....	565
C. Summarizing the Concept of Temporal Segmentation in the Context of Exactions	566
V. Conclusion	567

INTRODUCTION

This article explores the constitutional constraints on the ability of local governments to attach conditions, or “exactions,” to discretionary land use permits in an effort to address future cumulative impacts to which proposed development is anticipated to contribute.¹ Unlike traditional exactions that respond to immediate development harms, these “exactions for the future” can present land assembly concerns and involve inherently uncertain long-range forecasting. However, it is not clear that these practical impediments are sufficient to warrant the current near-categorical prohibition on such exactions that is imposed by Fifth Amendment Takings Clause jurisprudence.² Indeed, reasonable implementation of exactions for the future could serve as a sensible approach to counter modern development challenges presented by population rise and climate change, which threaten to place new stresses on public infrastructure and the environment.³ After

¹ A “discretionary” permit is one the government is not legally obligated to provide.

² In a prior article, I analyzed the contours of property’s multiple dimensions—theory, space, stringency, and time—as they arise in exaction takings contests. See Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENV’T L. 277 (2011). That piece suggested that issues of temporality stand as the most perplexing, unsettled, and multi-faceted of these dimensions. I asserted that deducing property’s temporal characteristics plays an important role in two contexts that are particularly relevant to the realm of exaction takings. That article assessed the first: defining the point in time—be it upon the proposition or imposition of regulatory action—when property’s other dimensions attach as to any particular takings claimant. This article assesses the second: accounting for the delay between a regulatory action and the external impact that regulation is intended to cure.

³ Of course, conditioning land use permits is not the only, or even the primary, tool for dealing with future environmental or infrastructural impacts of new development. However, it is a tool, and an important one at that, to respond to unique circumstances posed by development

analyzing the features of takings law that constrict the use of such an exactions scheme, this article offers an alternative approach to exaction imposition involving temporal segmentation of the government's sought-after interest, which could provide a public tool to address anticipated future harms while offering at least some protection against takings claims.

Part I of the article surveys the historical rise of exactions to situate their role in the context of modern land use planning and takings law. As explained in more detail below, the regular practice of imposing exactions took hold amidst the suburbanization that followed World War II.⁴ Fiscally constrained state and local governments sought to counter the infrastructural and environmental impacts resulting from this new development at a time when public revenues from conventional sources were insufficient to keep pace.⁵ Traditionally, state courts exclusively policed exactions in a manner quite deferential to public authorities, warding off only those egregious, indefensible abuses of this land use tool.⁶ That model subsisted with few complaints for several decades, as governments commonly employed exactions quite reasonably.⁷ However, beginning in 1987 amidst certain Justices' suspicions that such a discretionary power regularly could be used in an exploitative fashion, a divided U.S. Supreme Court in *Nollan v. California Coastal Commission*⁸ and *Dolan v. City of Tigard*⁹ identified more stringent criteria for reviewing

applications. See, e.g., Jessica Grannis, *Adaptation Tool Kit: Sea-Level Rise and Coastal Land Use*, GEORGETOWN CLIMATE CENTER, 29–30 (October 2011) http://www.georgetownclimate.org/sites/default/files/Adaptation_Tool_Kit_SLR.pdf (identifying exactions as one of eighteen land use tools that can be used to preemptively respond to the threats posed by sea-level rise); J. PETER BYRNE & JESSICA GRANNIS, *Coastal Retreat Measures*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE* (Michael B. Gerrard & Katrina F. Kuh eds., forthcoming 2012), available at <http://www.vermontlaw.edu/Documents/2011TakingsConference/14%20Byrne-%20Coastal%20Retreat%20Measures.pdf> (suggesting that exactions “could allow for continued development while preserving the right to require future retreat [from the coast]”).

⁴See Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1523 (2006).

⁵See STATE AND LOCAL GOVERNMENT LAW SECTION, AMERICAN BAR ASSOCIATION, EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE *DOLAN* ERA xxxiii (Robert H. Freilich & David W. Bushek eds., 1995) [hereinafter EXACTIONS, IMPACT FEES AND DEDICATIONS].

⁶See *infra* note 38 and accompanying text.

⁷See Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. REV. 177, 199–201 (2006).

⁸*Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

⁹*Dolan v. City of Tigard*, 512 U.S. 374 (1994).

exactions.¹⁰ In accord with these cases, the permitting entity must prove that exactions eliminating a landowner's right to exclude—and possibly other types of exactions, as well¹¹—bear an “essential nexus” to and are in “rough proportionality” with the development's impacts to avoid takings liability.¹²

With this historical and jurisprudential backdrop in place, Part II introduces “exactions for the future.” The Part begins by differentiating exactions for the future from traditional exactions of the kind to which the formalism of *Nollan* and *Dolan* are more easily applied. It then presents a hypothetical coastal permitting scenario that involves two contexts in which exactions for the future conceivably could be levied: (1) the proposed development is unlikely to create traffic problems immediately, yet it is forecasted to contribute to significant traffic congestion when coupled with other projected development on neighboring lots; and (2) several reputable scientific sources predict that the development could accelerate or amplify the impacts of sea-level rise. With the aid of this hypothetical, Part II characterizes exactions for the future as permit conditions that impose an immediate burden on the applicant developer but are designed to mitigate harm from development that will only be felt in the future.¹³ Part II closes with a discussion of several practical hurdles related to land assembly and forecasting uncertainty that can pose difficulties for local governments considering the implementation of this type of exaction.

Part III explores two unique features of the U.S. Supreme Court's exaction takings jurisprudence that presumably flow from the land assembly and forecasting uncertainties identified in Part II. First, the Court has demonstrated a peculiar disfavor toward exactions that are part of larger or long-term community plans, marking a significant break from planning's place in two other major areas of takings law: regulatory takings and “public use” jurisprudence.¹⁴ Second, the Court's exaction takings tests

¹⁰ While the Supreme Court contended in *Dolan* that the standard it was imposing under the federal constitution was consonant with the existing standard then in effect in the majority of states, this article contests that contention. See *infra* note 38 and accompanying text.

¹¹ See Mulvaney, *supra* note 2, at 287–88.

¹² See *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391 (holding that “the city must make some sort of individualized determination” regarding the quantitative relationship between the permit condition and the development's impacts).

¹³ For purposes of this article, the term “permit” encompasses successful applications for zoning modifications, subdivision, site plan review, construction permits, variances, and the like.

¹⁴ See *infra* Part III.A.

curiously authorize heightened judicial scrutiny of exactions' rationality—a traditional due process question, only more probing—and allow for takings liability findings in instances where the economic impact of the exaction is quite modest.¹⁵ Part III concludes, then, that the existing exaction takings framework reflects an aversion to planning and a reversion to probing judicial review, which in combination effectively serve to categorically prohibit exactions for the future.

Assuming these features of exaction takings law will remain in place for the considerable future,¹⁶ Part IV outlines the contours of an alternative approach to exaction imposition that could open the door for reasonable implementation of exactions aimed at anticipated harms. This approach involves the conceptual idea of incorporating temporally severed property interests into the realm of land use exactions, such that the government might condition approvals not on a present dedication or easement, but rather on a future interest that is triggered upon the happening of a stated event. Such an approach could at least partially mollify landowners' practical assembly and forecasting concerns that exactions for the future initially spark. Moreover, in light of the fact that the present value of the exacted future interest would be discounted by the rate of return the landowner could reap for the relevant piece of land, compounded over the number of years likely to pass before the triggering event is anticipated to occur, this approach also could soften any economic injury. The Part also, however, identifies several disadvantages of this approach to exaction imposition, particularly with respect to potential spoliation of the relevant property and insufficient governmental enforcement.

Part V concludes that property owners' concerns regarding land assembly and forecasting uncertainty have bred an exaction takings model that creates a significant impediment to imposing exactions responsive to those development harms that will manifest only in the future. It suggests that acknowledging the unique features of this area of law that are constraining the implementation of exactions for the future could prompt a broader debate about the nature of property and the constitutional barriers to land use regulation in an era of considerable population and environmental change. However, so long as the current stringent takings review of exactions remains intact, Part V suggests that, to temper landowners'

¹⁵ See *infra* Part III.B.

¹⁶ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (unanimously reaffirming that *Nollan* and *Dolan* are applicable when claimants challenge exactions as unconstitutional takings).

apprehensions surrounding assembly and forecasting accuracy, local governments might consider the alternative approach to conditioning development permits that is outlined herein.

I. EXACTIONS' PLACE

In theory, land use exactions oblige property owners to internalize the expected external burdens from proposed intensified use of their land in accord with a discretionarily issued government permit.¹⁷ This Part first reviews the rise of exactions as an important land use tool for fiscally-constrained state and local governments, particularly in the face of fervent voter opposition to new and increased taxation. Then, to set the stage for the lengthy discussion of exactions for the future in the Parts that follow, this Part explains the marked shift from generally deferential state judicial scrutiny of land use exactions towards the stringent judicial scrutiny reflected in the U.S. Supreme Court's exaction takings jurisprudence.

A. *The Prelude to Exaction Takings*

Throughout the nineteenth century and leading up to the Great Depression, subdividing land required only a whim, a pen, and a map.¹⁸ The fact that large landholders bore no responsibility for constructing public improvements needed to serve these subdivided lands led to a rash of what has been characterized as "premature" subdivision.¹⁹ This overabundance of subdivided lots led to vacancy and tax delinquency,

¹⁷ See generally Vicki Been, "Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 479 (1991); Daniel A. Crane, Comment, *A Poor Relation? Regulatory Takings after Dolan v. City of Tigard*, 63 U. CHI. L. REV. 199, 199 (1996); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 733-34 (2007) [hereinafter Fenster, *Constitutional Shadow*]; Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 623-24 (2004) [hereinafter Fenster, *Takings Formalism*]; Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2196-97 (2004); Deborah Rhoads, *Developer Exactions and Public Decision Making in the United States and England*, 11 ARIZ. J. INT'L & COMP. L. 469, 469, 474 (1994); Nick Rosenberg, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 641-42 (2003).

¹⁸ See R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 5 (1987).

¹⁹ See *id.*

depriving municipalities of the ability to incentivize commercial development with public infrastructural support.²⁰ This phenomenon, in turn, impeded orderly growth, for it induced potential developers to skip over these blighted “dead lands” and carve out new subdivisions on the still farther outskirts of town.²¹

The Standard City Planning Enabling Act of 1928 sought to respond to this problem.²² The Act counseled municipalities to condition land use approval on the developer providing necessities such as “streets, water mains, sewer lines, and other utility structures” to cope with the increased infrastructural impact in the immediate area.²³ These permit conditions were the first routinely institutionalized exactions, and they typically only took the form of direct infrastructural enhancement; in other words, the first exactions focused on impacts that the applicant would be able to remedy internally (i.e., on-site) and in the near term.²⁴ The Great Depression spurred this early practice of internal exactions, as other sources of infrastructure funding—ad valorem taxes and special assessments—went unpaid under the weight of the economic decline.²⁵ The real estate community challenged these conditional requirements, but it almost universally failed to sway the courts in its favor.²⁶ By the middle of the twentieth century, imposing internal exactions on subdividers and developers had become common practice.

²⁰ *See id.*

²¹ *Id.* (“[New] residential developments leapfrogged over . . . areas of dead land into unsubdivided lands lying beyond the old, moribund subdivisions.”).

²² U.S. DEPARTMENT OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT III (1928).

²³ Jennifer Evans-Cowley, *Development Exactions: Process and Planning Issues* 3 (Lincoln Inst. of Land Policy, Working Paper WP06JEC1, 2006).

²⁴ *See id.*

²⁵ *See* Smith, *supra* note 18, at 6 (explaining a cycle whereby incentives to pay special assessments—levied to construct physical improvements on subdivided parcels—arose only when the assessed lot had been improved and foreclosure proceedings to reap these payments largely proved worthless because of the depreciation in land values). *See also* Been, *supra* note 17, at 479 (suggesting that “[e]xactions are an outgrowth of the centuries-old practice of levying ‘special assessments’ . . . [because in] the 1920s and 1930s, widespread bankruptcies and delinquencies on special assessments . . . left many local governments unable to recoup the costs of public improvements.”).

²⁶ *See, e.g.,* Ridgefield Land Co. v. Detroit, 217 N.W. 58 (Mich. 1928) (subdivision street dedications); Mefford v. City of Tulare, 228 P.2d 847 (Cal. Dist. Ct. App. 1951) (sewers); Brous v. Smith, 106 N.E.2d 503 (N.Y. 1952) (roadway improvements); Petterson v. City of Naperville, 137 N.E.2d 371 (Ill. 1956) (gutters and curbs).

In conjunction with the mass suburbanization and associated social ills that followed World War II, select local governments began to take regulatory actions that imposed external (i.e., off-site) requirements, as well.²⁷ In the face of federal and state funding cuts to local governments in the 1970s and 1980s, developer-borne exactions looked more and more like an attractive option to the public and its elected representatives when compared with the otherwise increased local property taxes that residents would shoulder.²⁸ Over the course of time, wastewater facilities, schools, public parks, precinct houses, fire stations, and even day care services became public welfare projects that developers might be expected to help provide in conjunction with the government's approval of their proposed land use intensification.²⁹

B. Exaction Takings

As might be expected, developers fought vehemently against the expansion of exactions to include these types of off-site improvements, alleging inequities, inefficiencies, and general ineffectiveness in what they saw as a piecemeal, ad hoc land use permitting process.³⁰ This time, the landowners had some—albeit very limited—success.³¹ This success generally came in the form of state laws and state supreme court decisions imposing varying—though rarely stringent—constraints on local

²⁷ See Evans-Cowley, *supra* note 23, at 3. Discussing these emerging requirements in a general sense, the U.S. Supreme Court acknowledged in the 1950s that the police power encompassed more than “public health, public safety, [and] morality,” but could also be used to make the surrounding “community . . . beautiful as well as healthy.” *Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

²⁸ See Evans-Cowley, *supra* note 23, at 3.

²⁹ See *id.* at 3–4; Been, *supra* note 17, at 479; AMERICAN BAR ASSOCIATION, *supra* note 5, at xxxiii–xxxiv.

³⁰ See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 1042 (6th ed. 2006) (“[F]or local communities, enacting regulations is like printing money, because the legal restrictions can be relaxed in exchange for goods and services.”); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 841–46 (1983) (“[C]ritics object most to the piecemeal changes in local land regulations [including] . . . the ‘conditional use permit . . .’”).

³¹ Compare, e.g., *Arrowhead Dev. Co. v. Livingston Cnty. Rd. Comm’n*, 322 N.W.2d 702 (Mich. 1982) (concluding that a county did not have authority to require a developer to improve an off-site road), with, e.g., *Hudson Oil Co. of Mo., Inc. v. City of Wichita*, 396 P.2d 271 (Kan. 1964) (upholding a requirement that a developer dedicate an off-site right of way for a service road to prevent private driveway access to an arterial street).

government use of exactions.³² Many states employed a “reasonable relationship” test that accounted for both the burdens and benefits to the property owner from the imposed exaction; even those states employing an arguably more stringent “specifically and uniquely attributable” test regularly placed the burden of proof on the challenging landowner.³³ Yet beginning with *Nollan* in 1987 and continuing with *Dolan* seven years later, the U.S. Supreme Court pronounced a marked shift away from judicial deference toward municipal use of exactions in the face of landowner claims that such exactions violated the Fifth Amendment’s prohibition on taking private property for public use without just compensation.

In *Nollan v. California Coastal Commission*, the Court declared that, in order to avoid takings liability, the state—as the *defendant*—must prove that exactions bear an “essential nexus” to the impacts caused by the permitted development.³⁴ Seven years later, in *Dolan v. City of Tigard*, the Court added an additional requirement to the nexus test of *Nollan*.³⁵ *Dolan* compels the state to make an “individualized determination” proving that the public cost of those harms attributable to the proposed development is “rough[ly] proportion[ate]” to the cost of the burden borne by the applicant in reducing those public costs.³⁶

³²For a standard particularly deferential to the government, see *Grupe v. California Coastal Commission*, 212 Cal. Rptr. 578 (1985) (requiring only an “indirect relationship” between the exaction and a need attributable to the proposed development).

³³See *infra* notes 38, 114–119 and accompanying text.

³⁴483 U.S. 825, 837 (1987).

³⁵512 U.S. 374, 391 (1994).

³⁶*Id.* (holding that “the city must make some sort of individualized determination” regarding the quantitative nature of the condition). In actuality, the variables appropriate for comparison under *Dolan*’s “rough proportionality” analysis are not settled. See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 107 n.55 (2002) (suggesting that *Dolan*’s “rough proportionality” test is “hardly [a] beacon[] of clarity”). There are at least five values that could be relevant: (1) the public cost of those harms attributable to the proposed development; (2) the cost of the burden borne by the applicant in reducing those public costs; (3) the expected reduction in those public costs resulting from the permit conditions; (4) the market value of the “property” acquired through the permit condition; and (5) the financial benefits the applicant will realize from the permit. One could make a colorable argument that the relevant comparison is between (1) and (2), (1) and (3), (1) and (4), or (3) and (4), and quite possibly even (1) and (5). For a sampling of literature discussing the variables that are potentially pertinent in a *Dolan* analysis, see, e.g., JOHN MARTINEZ, GOVERNMENT TAKINGS § 2:19 (2006); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 885 (1995); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 631 (1996).

The majorities in these contentious five-to-four decisions apparently were concerned that government officials could extort public infrastructure and amenities through exactions from landowners with little political influence.³⁷ Together, the commands of *Nollan* and *Dolan* represent a more stringent standard of review than most, if not all, state courts previously employed in the permit condition context.³⁸

³⁷ Scholars long have weighed whether this branch of public choice theory justifies takings doctrine. For a sampling of this literature, see, e.g., Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829 (1989); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333 (1991); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125 (1992); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992). The claim that waterfront landowners in risky but desirable locales—such as *Nollan* and, arguably, *Dolan*—actually lack political influence is subject to question. See, e.g., Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243 (1993) (suggesting that beachfront landowners are unduly powerful, for this minority group can easily organize politically in light of their geographic and socioeconomic concentration, and therefore no takings compensation should be due for coastal development prohibitions because those regulations simply protect against “special interest” subsidies such as flood insurance and disaster relief); Vicki Been, *Lucas v. the Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in PROPERTY STORIES 221, 228–30 (Gerald Korngold & Andrew P. Morriss eds., 2004) (“The history of both beachfront development and disaster relief policies confirm what political theory predicts: beachfront owners repeatedly score considerable victories in federal, state, and local political battles over the regulation and development of the coast.”).

³⁸ Of the five state cases the *Dolan* court cited as the foundation of its “rough proportionality” test—*Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976), *Simpson v. City of N. Platte*, 292 N.W.2d 297 (Neb. 1980), *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984), *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979), and *Jordan v. Vill. of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965)—all placed the burden of proof on the plaintiff to prove that the exaction bore no semblance of reason. See, e.g., EXACTIONS, IMPACT FEES AND DEDICATIONS, *supra* note 5 (suggesting that none of the five state cases cited by *Dolan* as support for the “rough proportionality” test called for an intermediate standard of review, with the possible exception of *Jordan*, 137 N.W.2d 442); Julian R. Kossow, *Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 228 (1995) (contending that no state case cited in *Dolan* called for the level of scrutiny that is required by the “rough proportionality” test). Indeed, even the few states requiring that exactions must be “specifically and uniquely attributable” to the developer’s project—a test that the Chief Justice explicitly rejected as too demanding, see *Dolan*, 512 U.S. at 390 (“We do not think the Federal Constitution requires such exacting scrutiny . . .”)—generally do not impose the rigor of the “rough proportionality” test. Of the five state cases cited by the majority as employing the “specifically and uniquely attributable” test, at least four are not analogous in that they placed the burden of proof on the government. See, e.g., *Wald Corp. v. Metro. Dade Cnty.*, 338 So. 2d 863, 866 (Fla. Dist. Ct. App. 1976) (suggesting in 1976 that an Illinois case that the *Dolan* court would

II. RELYING ON EXACTIONS TO PREPARE FOR FUTURE CONTINGENCIES

The paradigmatic exaction immediately responds to a public harm. In such an instance, the *Nollan* and *Dolan* tests outlined in the prior Part are a relatively easy fit: the exaction passes takings muster only if it is both qualitatively linked and quantitatively proportionate to the public harms resulting from the approved project.³⁹ For instance, where development blocks a vertical access way to a public beach, an exaction demanding a similar, alternative right-of-way to the beach likely would serve as an appropriate offset, while a dedication of land for the construction of a new post office would not.⁴⁰ However, implementation of the exactions tool often poses significantly more complexity than this paradigmatic example would suggest. Indeed, as the first section below explains, even *Nollan* and *Dolan* themselves involved conditioning development proposals on exactions that, at least in part, would not benefit the public until some indeterminate point in the future. The second section of this Part presents a hypothetical fact pattern that acutely addresses two instances where such “exactions for the future” conceivably could be imposed. The third section builds off the prior two to highlight the principal challenges facing those local governments that seek to incorporate such exactions into their permitting models.

later cite as too demanding for federal constitutional purposes—*Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961)—placed the burden of proof on the state). The lone possible exception is *Frank Asuini, Inc. v. City of Cranston*, 264 A.2d 910, 913 (R.I. 1970), which arguably required the city to prove that a developer’s “donation” for recreational purposes of seven percent of the land to be subdivided as a condition of final plat approval “will result from activities specifically and uniquely attributable to [the developer].”

³⁹ See *supra* notes 34–36 and accompanying text.

⁴⁰ However, there are some types of immediate burdens that may be difficult or even impossible to mitigate in light of *Nollan*’s nexus test, such as the sunlight lost by neighbors due to the construction of a tall building or the alteration of a historic doorway. See, e.g., David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1282–86 (1997) (“If sunlight is blocked, it is blocked, period. [Without *Nollan*,] the locality could allow the building but place conditions on the development . . . that compensate the locality for the social cost of lost sunlight . . . [With *Nollan*], however, the locality cannot impose any conditions . . . because there simply are no conditions that mitigate the specific social costs of the project.”); Been, *supra* note 17, at 544, n.333 (“It is no less rational for a community to decide that it will accept an unrelated benefit to make up for the harm than it would be for the community to accept a related benefit; indeed, if the related benefit would be valued less by the public than the substitute unrelated benefit, it would be irrational for the city to reject the substitute.”).

A. Nollan and Dolan: Exactions for the Present and the Future

In *Nollan*, the California Coastal Commission's approving the conversion of an oceanfront cottage to a large home would block the public's view of the ocean.⁴¹ The Court concluded that the exaction attached to that approval—a public walking easement along the ocean—did not, and could never, alleviate that immediate development impact.⁴² But if the public-access-way exaction had been implemented (setting aside the lack of nexus finding for the moment), it would have in one sense provided an immediate benefit to the public. The public is entitled to traverse the wet sand area below the mean high water line in California, as it can in most states.⁴³ Therefore, travelers along the wet sand (or swimmers and other water users, for that matter) could have rested or recreated on the dry beach area adjacent to the Nollans' home at the instant the exaction was implemented.

Yet the exaction imposed on the Nollans also could have provided a different public benefit in the future.⁴⁴ If and when the state exacted or otherwise accumulated similar easements from all other oceanfront landowners in the region, the easement on the Nollans' property would contribute to a continuous public walking corridor on the dry sand.⁴⁵ This

⁴¹ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

⁴² Once the majority settled on a narrow definition of "public access" that excluded visual access, it had little difficulty concluding that a public walking easement did not meet the Court's new "essential nexus" test. *See id.* at 837–38. *But see id.* at 849–50 (Brennan, J., dissenting) (suggesting the majority has an "unrealistically limited conception of what measures could reasonably be chosen to mitigate the burden produced by a diminution of visual access"). The Court, however, suggested that a condition restricting the height or width of the proposed structure, prohibiting fences, or requiring the provision of a public "viewing spot" would alleviate the view loss, and it would do so immediately. *Id.* at 836. Some scholars have noted that, if presented a choice between providing a public viewing spot on one's upland property and an access corridor along the water, many might very well select the access corridor. *See, e.g.,* Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 47–48.

⁴³ However, several states, including Delaware, Maine, Pennsylvania, and Virginia, are "low water" states, with public ownership of the submerged lands lying seaward of the mean low water line. *See, e.g.,* VA. CODE ANN. § 62.1–81 (2008); Delaware *ex rel. Buckson v. Pa. R.R. Co.*, 228 A.2d 587, 597 (Del. 1967) (stating that the riparian proprietor owns to the low water mark); *Bell v. Town of Wells*, 557 A.2d 168, 176 (Me. 1989); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869) (holding that riparian title extends to the low-water mark, though allowing for public passage during high tides).

⁴⁴ *See Nollan*, 483 U.S. at 827, 829.

⁴⁵ *See id.*

corridor, assembled over time, would have allowed lateral public access between two nearby public beaches even at the highest of tides.⁴⁶

In *Dolan*, the public harms emanating from the applied-for development took two forms.⁴⁷ First, the landowner's requested expansion of a hardware store and paving over a gravel parking lot along a creek would increase impervious cover, thereby preventing the infiltration of water into the underlying soil and increasing the current risk of flooding.⁴⁸ Second, the expansion of the store would bring more customers into the downtown area, and with more customers come more cars.⁴⁹ As in *Nollan*, the exaction at issue in *Dolan*—the dedication of a strip of the applicant's land for floodplain management and a bicycle path—would provide both immediate and projected future benefits to the public to offset these harms.⁵⁰ The city's maintenance of the creek's floodplain adjacent to the Dolan's development could provide near-term public flood protection benefits; however, the continuous public floodplain possible upon a similar dedication by all other landowners fronting the creek would provide a significantly more effective public flood control amenity. Similarly, whether the public bicycle path would have conferred much of an immediate public benefit is dependent upon how many other portions of the path had not yet been acquired or paved by the city.⁵¹

B. Hypothetical Exactions for the Future

The above analysis of the exactions at issue in *Nollan* and *Dolan* provides a glimpse into the practical and legal impediments to implementing exactions for the future. To highlight and more fully understand these impediments, this section poses a hypothetical fact pattern

⁴⁶ See *id.*

⁴⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 381–82 (1994).

⁴⁸ *Id.* at 382.

⁴⁹ *Id.* at 379, 389.

⁵⁰ *Id.* at 387–89.

⁵¹ The City of Tigard continues to expand the bicycle trail along the creek that abuts the Dolan property. See Will Vanlue, *City of Tigard to Close Another Gap in Fanno Creek Trail*, BIKEPORTLAND.ORG (Jan. 20, 2012, 11:23 AM), http://bikeportland.org/2012/01/20/city-of-tigard-to-close-another-gap-in-fanno-creek-trail-65540?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+BikePortland+%28BikePortland.org%29. The City of Tigard recently reported that sixty percent of the city's segments of the fifteen-mile trail are complete. See *Trails in Tigard: Fanno Creek Trail Project*, CITY OF TIGARD, (http://www.tigard-or.gov/community/parks/trails_in_tigard.asp (last visited May 6, 2012)).

that offers two contexts in which such exactions might be, in the abstract, not only a productive counter to the requested development's anticipated impacts but the only counter.

A hypothetical developer, Branch Durant, owns an undeveloped, twenty-five acre lot in the coastal town of Cape Surf in the fictional fifty-first state of Old Jersey. The city's primary coastal corridor, Main Street, lies to the west of the lot, while the Atlantic Ocean lies to the east. While Old Jersey no longer issues riparian grants for lands that are flowed by the tide, the state did issue numerous such grants over a century ago, and Durant happens to be the lone remaining holder of such a grant in Cape Surf.⁵² The grant, issued to Durant's predecessors in 1907, runs the width of Durant's upland lot and extends 200 feet into the ocean.

Durant seeks to intensify the use of the upland lot by constructing a multi-unit condominium complex. As delegated by Old Jersey's constitution, a state statute, and its municipal charter, the Cape Surf City Council enjoys the authority to deny property owners' applications when the development would impair the public health, safety, and welfare, as well as to require owners to mitigate the anticipated effects of their development as a condition of receiving the necessary regulatory approvals.

Durant files the appropriate application with the city, and the city's planning staff undertakes a detailed review of the development proposal therein. The planning staff concludes that Durant has taken considerable account of the many immediate public impacts of his proposed development, such as the stresses placed on the city's schools, hospitals, and sewage infrastructure, as well as the effects on wildlife present in the region. However, the planning staff identifies two potential public impacts that Durant's proposal does not take into account. First, while Durant's development is unlikely to create traffic problems immediately, it is forecasted to contribute to significant traffic congestion along Main Street when coupled with other projected development along this stretch of coast. Second, several reputable scientific sources predict that, in this region of

⁵² The regular alienation of tidally flowed lands was a common practice in New Jersey and several other states through the early twentieth century. Today, New Jersey generally only issues grants for lands that already have been filled in and are no longer flowed by the tide. See *Tidelands Program: Basic Questions and Answers*, DIVISION OF LAND USE REGULATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, <http://www.nj.gov/dep/landuse/tideland.html#q4> (last visited on Apr. 14, 2012).

Old Jersey, development akin to that proposed by Durant could accelerate or amplify the impacts of sea-level rise attributable to climate change.⁵³

In such a situation, it might be advantageous for both Durant and the planning staff to discuss their individual positions.⁵⁴ Durant might express his willingness and ability to pay impact fees, dedicate land, or limit the size of his development; the planning staff might convey its concerns about the project and the development options that it would be willing to recommend to the city council. Such initial discussions may lead to an agreement that would result in one or more conditions of an acceptable type and quantity for both parties. In that instance, Durant would agree to certain mitigation measures in exchange for a required approval, in light of the potential draconian alternative: an outright denial of his permit application, which the city council has the regulatory authority (if not always the political will) to issue.⁵⁵ The city council also might prefer this negotiated agreement, for it furthers the city's regulatory goals while limiting the risks and costs associated with litigation that might follow either a permit denial or unilaterally imposed conditions.

However, in this instance, Durant and the planning staff are not able to reach a mutually beneficial resolution. The planning staff weighs recommending that the city council either deny the permit or grant it with certain mitigating conditions to which Durant would not voluntarily agree.

⁵³Increasing global temperatures are accompanied by sea-level rise for two basic reasons. First, the warmer the water, the more the water expands. In a warmer climate, the seas simply will occupy more cubic space. Second and more significant, global temperatures dictate what percentage of the water on earth is in the form of ice. Melted ice is released into the oceans, thereby contributing to sea-level rise. See Intergovernmental Panel on Climate Change Working Group II, *Summary for Policymakers*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY 12–17 (M.L. Parry et al., eds., 2007) available at <http://www.ipcc-wg2.gov/AR4/website/spm.pdf>. The most damaging effects of sea-level rise along a built coastal environment—magnified erosion of beaches, heightened coastal flooding, increased public health and safety risks, damaged public infrastructure, etc.—are not always expected to be felt immediately after development.

⁵⁴This paragraph draws heavily from the hypothetical fact pattern presented in a forthcoming article by Mark Fenster. See Mark Fenster, *Failed Exactions*, 36 Vermont L. Rev. (forthcoming 2012).

⁵⁵This hypothetical assumes the highly likely event that Durant's property would maintain economic value in the event the city council denied this particular development proposal, whereby Cape Surf would not be required to provide compensation to Durant for the denial under the partial takings framework set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124–28 (1978). For a discussion of the *Penn Central* framework, see *infra* notes 68–71 and accompanying text.

Ultimately, the city council accepts a planning staff recommendation to grant the permit request on conditions targeted to address the two identified public impacts that are not mitigated in Durant's proposal. These conditions include: (1) the dedication of a fifteen-foot-wide public right-of-way along the project site's Main Street frontage, and (2) the dedication of Durant's riparian lands and a twenty-foot-wide public right-of-way along the upland lot's entire ocean frontage.

The former dedication along the western edge of the property would allow for the future widening of Main Street to accommodate increases in traffic. The latter dedications on the ocean side of the property would allow for the commencement of beach re-nourishment, dune-building, artificial reef installation, jetty construction, and other shore protection projects, for these interests in Durant's tidelands and uplands are the final property interests that need to be secured for these projects to move forward. Together, these shore protection projects are anticipated by federal, state, and local governmental entities, as well as some independent experts, to safeguard Cape Surf from a two foot rise in sea level through the year 2100.⁵⁶ Specifically with respect to Durant's property, these shore protection measures will counter several impacts resulting from the proposed development, including sand dune degradation, extension of public infrastructure into a vulnerable area, and the possibility that, should the structure ultimately sustain damage or destruction as a result of rising seas, debris from the site could harm neighboring and inland residents.⁵⁷

C. Challenges to Imposing Exactions for the Future

The city-imposed conditions in the above hypothetical represent "exactions for the future" in that they impose an immediate burden on

⁵⁶This hypothetical assumes that Cape Surf has rejected an ecologically sensible approach that would allow for the natural inland migration of the sea. For a particularly thought-provoking piece in this regard, see Marc R. Poirier, *A Very Clear Blue Line: Behavioral Economics, Public Choice, Public Art and Sea Level Rise*, 16 SOUTHEASTERN ENVTL. L.J. 83, 111 (2007) ("Nature itself will have its say . . .").

⁵⁷*Id.* at 108 ("Sea level rise will affect many parts of the world in many different ways; but each individual locality will be affected individually, community by community—even, one could say, property by property And each community will be called to respond just as locally. The problem can be described abstractly and generally, but it also is inevitably local and concrete.") (footnote omitted). See also Poirier, *supra* note 37, at 256–58; ENVIRONMENTAL PROTECTION AGENCY, COASTAL SENSITIVITY TO SEA LEVEL RISE: A FOCUS ON THE MID-ATLANTIC REGION (2009).

Durant but are designed to mitigate harm from the requested development in a way that the benefits of the exactions will only be felt in the future. The dedication of the fifteen-foot-wide public right-of-way along the project site's Main Street frontage immediately deprives Durant of the ability to exclude others from the area and to develop that area for economic use;⁵⁸ however, it will only provide a tangible benefit to the public if and when Main Street actually is expanded. The dedication of Durant's riparian lands and a twenty-foot-wide public right-of-way along the upland lot's ocean frontage similarly restrains Durant's ability to exclude and develop those areas, yet the shore protection efforts it allows will only provide a meaningful public benefit if and when considerable sea-level rise occurs.⁵⁹

The requested dedications demonstrate that different types of exactions for the future can present different challenges. For one, the roadway dedication raises a land assembly issue.⁶⁰ At first glance, if a city lacks all of the required dedications to expand a particular street, one could argue that any benefits that the city claimed stemmed from this particular dedication would be illusory.⁶¹ Yet, on the other hand, it seems that the coordinated implementation of multiple exactions, all designed to serve the same purpose, must be executed together in order to work; indeed, if one

⁵⁸ See Sam D. Starritt & John H. McClanahan, *Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West after Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 415, 461 (1995) (suggesting that, in authoring the majority opinion in *Dolan*, Chief Justice Rehnquist "hung his hat on the fact that the Dolans would have lost their right to exclude from real property").

⁵⁹ These shore protection projects likely will provide some near-term protection against flash flooding associated with coastal storms. See, e.g., James G. Titus, *Does the U.S. Government Realize That the Sea is Rising? How to Restructure Federal Programs So that Wetlands and Beaches Survive*, 30 GOLDEN GATE U. L. REV. 717, 749 (2000) (describing these types of benefits as "incidental"). However, their primary design goal is to protect against consistent elevated inundation.

⁶⁰ The ocean-side dedication does not—or at least no longer—raises this assembly issue, for the state has acquired all other property interests necessary to commence the shore protection projects.

⁶¹ See e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 382 (1994); *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980) (rejecting a right-of-way exaction imposed to facilitate street development because of substantial uncertainty regarding whether the city could acquire other necessary exactions from surrounding properties); *Burton v. Clark Cnty.*, 958 P.2d 343, 356–57 (1998) (rejecting a right-of-way exaction intended to connect neighborhood streets when it was substantially uncertain whether the city could acquire a similar and equally necessary exaction on neighboring property).

landowner could avoid an exaction because the city had not yet obtained all dedications necessary to improve a street immediately, no such improvement would ever be possible.⁶²

While the ocean-side dedications do not raise a similar assembly issue in this case, both the roadway and ocean-side dedications present a challenge that is consistent across all exactions for the future. That is, these exactions are based on government projections that inherently involve some significant degree of uncertainty.⁶³ Here, the roadway dedication is based on the assumption that population increase and economic conditions will lead to the actual development of the private lands alongside the path of Main Street's projected expansion; however, a market collapse, unexpected alterations in development patterns, and multiple other factors could prove that assumption false. Moreover, the roadway dedication assumes the government will have the opportunity to exact or purchase the additional, necessary rights-of-way from other land owners. Similarly, the ocean-side dedication is based on scientific estimates of the rate and extent of future sea-level rise, even though it is at least possible that new discoveries will be made, significant climate mitigation measures will be enacted, or sensible geo-engineering techniques will be developed, that prove those sea-level rise estimates were exaggerated.⁶⁴

The following Part explores two features of the U.S. Supreme Court's exaction takings jurisprudence that presumably flow from the land

⁶² See generally *McClure v. City of Springfield*, 28 P.3d 1222 (Or. Ct. App. 2001).

⁶³ The ability to foresee how development will unfold undoubtedly is complicated in a dynamic, constantly fluctuating economy. See, e.g., *See DANIEL P. SELMI, ET AL., LAND USE REGULATION* 48 (3d ed. 2008). A similar uncertainty pervades environmental policy. See David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1322 (2003) ("There are at least two distinct sources of unsureness in the environmental context: (1) the difficulty of assessing whether perceived health and environmental threats actually will result in harm, and if so, how much harm and (2) the difficulty of assessing whether available regulatory tools and technology will in fact result in the avoidance of any harms that might otherwise result.").

⁶⁴ While sea-level rise in response to warming global temperatures in the twentieth century and the beginning of the twenty-first century has already been recorded, there admittedly remains considerable debate as to the projected extent of the sea's rise. See, e.g., *Byrne & Grannis, supra* note 3, at 8. However, sea-level rise estimates have been consistently growing, not shrinking, with advances in predictive technologies and data collection. Moreover, it is generally agreed that even if the global community were to halt all anthropogenic contributions to the changing climate immediately through elimination of all greenhouse gas emissions, sea levels would continue to rise for several decades in light of the delayed effect of those emissions already in the atmosphere. See Intergovernmental Panel on Climate Change Working Group II, *supra* note 53, at 7–22.

assembly and forecasting uncertainties evident in the above hypothetical. These features of current takings law dictate that, should a landowner in a position similar to Durant file a takings challenge to dedications that seek to address anticipated but as-yet unknown cumulative future impacts of his permitted development, the government could face a nearly insurmountable hurdle.

III. EXACTIONS FOR THE FUTURE AS TAKINGS

This Part explores two ways in which the U.S. Supreme Court's exaction takings jurisprudence's response to landowners' concerns regarding assembly and forecasting uncertainty reflects principles that are otherwise rejected in traditional takings jurisprudence. The first involves the Supreme Court's abstract assertion that the government must bear the heightened burden set out in *Nollan* and *Dolan* solely when imposing exactions via an adjudicative process, only to ignore this assertion in practice by applying heightened scrutiny to broadly applicable exactions that are part of larger or long-term community plans. The second involves the Supreme Court's errant justification for preserving the notion that exactions must "substantially advance legitimate state interests."

A. *The Relevance of Comprehensive Land-Use Planning in Takings Law*

Land-use planning broadly guides property development by establishing the type and degree of allowable intensification of real property. It typically reflects a community's long-term design, economic conditions, geography, and environmental resources.⁶⁵ This section first briefly explains how the existence of comprehensive planning has long served as a basis for deference to government defendants in regulatory takings and eminent domain cases. It then distinguishes the prominent role of planning in these two areas of takings law from planning's rather peculiar role in exaction takings law, where the Supreme Court has strongly insinuated—though failed to follow—the notion that *Nollan* and *Dolan* do not apply to exactions that are part of broad, community-wide strategies. The section concludes by exploring the implications of the Supreme Court's artificial treatment of the legislative-adjudicative divide for those cases involving

⁶⁵ See e.g., Erin Ryan, Note, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 344–45 (2002).

exactions for the future.

1. Planning and Regulatory Takings

In regulatory takings disputes, the judiciary routinely defers to governmental planning efforts, such that they are less likely to find a taking when the challenged restriction fits within an existing comprehensive plan.⁶⁶ The primary reason behind this leaning is that when the political branches act comprehensively, rather than in a targeted way toward a particular individual, it is far more likely that the “decision reflects a thoughtful, carefully considered assessment of all relevant costs and benefits.”⁶⁷ Deference to regulation that is part of a broad plan is no more evident than in the “polestar”⁶⁸ of modern regulatory takings doctrine, *Penn Central Transportation Co. v. City of New York*.⁶⁹ Justice Brennan’s opinion for the majority, which concluded that no compensable taking occurred, asserted that New York City’s historic preservation law “embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”⁷⁰ The *Penn Central* Court went on to establish a multi-factor balancing test centered on the economic impact individual landowners bear in light of the reasonable expectations associated with their investment.⁷¹

Subsequent cases continually demonstrate that the Court is quite deferential to the government amidst evidence of planning. For instance, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, planning efforts to preserve the water quality of Lake Tahoe proved central to the Court’s rejection of property owners’ claims that a thirty-two month development moratorium categorically required the payment of compensation.⁷² The six-justice majority stressed the critical function of

⁶⁶ See, e.g., Byrne & Grannis, *supra* note 3, at 21; John D. Echeverria, *The Triumph of Justice Stevens and the Principle of Generality*, 7 VT. J. ENVTL. L. 22, 24 (2006); Nicole Stelle Garnett, *Planning as a Public Use?*, 34 ECOLOGY L.Q. 443, 448 (2007).

⁶⁷ See Echeverria, *supra* note 66, at 31 (suggesting that, to Justice Stevens, whether a rule “singles out” a takings claimant is more important than the diminution in value of the claimant’s land).

⁶⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001).

⁶⁹ 438 U.S. 104 (1978).

⁷⁰ *Id.* at 132.

⁷¹ *Id.* at 124–28.

⁷² 535 U.S. 302, 306 (2002) (framing the issue as “whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking

“interim development controls,” favorably citing “consensus in the planning community” that such devices “are an essential tool of successful development.”⁷³ Similarly, in *Agins v. City of Tiburon*, the Court cited to the city’s “interest in assuring careful and orderly development of residential property with provision of open-space areas,” suggesting that the benefits conferred via such a community-wide plan “must be considered along with any diminution in market value that the [takings claimants] might suffer.”⁷⁴

2. Planning and Eminent Domain

Outside the regulatory context, there is another significant body of U.S. Supreme Court takings jurisprudence that emphasizes planning.⁷⁵ Planning has led to government victories in cases surrounding the Fifth Amendment’s command that the government shall not take private property “for public use” without providing just compensation.⁷⁶ In *Berman v. Parker*, a unanimous Court concluded that the condemnation of properties in blight-designated areas for economic redevelopment purposes met the “public use” requirement.⁷⁷ Justice Douglas wrote for the Court that “blighted or slum area[s] . . . must be planned as a whole If owner after owner were permitted to resist[,] . . . integrated plans for redevelopment would suffer greatly.”⁷⁸

Planning took on increasing significance in *Kelo v. City of New London*.⁷⁹ Justice Stevens’ opinion for the Court emphasized that the

of property requiring compensation . . .”).

⁷³ *Id.* at 337–39. Indeed, development moratoria are widely employed by land use planners “to preserve the status quo while they formulate a more permanent development strategy.” See Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 751 (2004).

⁷⁴ 447 U.S. 255, 262 (1980). See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 722 (1999) (affirming a takings award where “the city’s denial of the final development permit was inconsistent not only with the city’s general ordinances and policies but even with the shifting ad hoc restrictions previously imposed by the city”).

⁷⁵ See Garnett, *supra* note 66, at 453–54.

⁷⁶ U.S. CONST. amend. V.

⁷⁷ 348 U.S. 26, 34 (1954).

⁷⁸ *Id.* at 34–35 (upholding the National Capital Planning Commission’s condemnation of a non-blighted department store building because of, in part, the comprehensive nature of the Commission’s redevelopment plan).

⁷⁹ 545 U.S. 469. As one scholar notes, “The *Kelo* majority mentioned the words ‘plan’ and ‘planning’ forty times; Justice Kennedy’s separate opinion brought the tally to nearly fifty.” See

comprehensive nature of the City of New London's planning process provided support for the finding that the condemnation of the residential properties at issue furthered a public economic redevelopment purpose.⁸⁰ Justice Kennedy joined the majority, but also authored a separate opinion.⁸¹ This separate opinion arguably went even further than the majority with respect to the import of planning.⁸² Justice Kennedy suggested that planning very well may be the determining factor in separating presumptively impermissible government acts from constitutional public takings.⁸³ While he would not engage in "conjecture" as to when such a presumption might apply, he explained his comfort with the conclusion that *Kelo* did not present such an instance.⁸⁴ As one scholar suggests,

Garnett, *supra* note 66, at 444.

⁸⁰ *Kelo*, 545 U.S. at 483–87 ("The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community [A] one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot . . ."). Some scholars have noted the irony in Justice Stevens' reliance on comprehensive planning in *Kelo*—which appears consistent with the Court's reliance on planning in *Penn Central*—in light of the fact that Justice Stevens joined the dissent in *Penn Central*. Echeverria, *supra* note 66, at 39–40 (suggesting Justice Stevens' views may have "evolved over time," and querying "whether Justice Stevens, if he had it to do all over again, would dissent in *Penn Central*").

⁸¹ *Kelo*, 545 U.S. at 490–93 (Kennedy, J., concurring).

⁸² *Id.* at 491.

⁸³ *Id.* See also Garnett, *supra* note 66, at 444. Kennedy's perspective echoes that of the Illinois Supreme Court's opinion in *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002). In that case, the Illinois Supreme Court rejected a proposed condemnation of land that would be used for parking as part of an alleged economic redevelopment plan. *Id.* at 10. The court declared:

[The Southwestern Illinois Development Authority] did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring [the] additional parking Clearly, the foundation of this taking is rooted not in the economic and planning process with which the [Authority] has been charged. Rather, this action was undertaken solely in response to [a private company's] expansion goals It appears [the Authority's] true intentions were to act as a default broker of land for [that private company's] proposed parking plan.

Id. *Southwestern Illinois Development Authority* provides the converse of *Western Seafood Co. v. United States*, 202 F. App'x 670, 674 (5th Cir. 2006), where the Court of Appeals for the Fifth Circuit rejected a landowner's claim that the government's asserted public purpose was pretextual because the government's significant planning measures mirrored those of New London in *Kelo*.

⁸⁴ *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) ("This taking occurred in the context of a comprehensive development plan meant to address a serious citywide depression, and the projected economic benefits of the project cannot be characterized as *de minimis*."). In hindsight,

“[G]overnment officials [post-*Kelo*] will view planning as a constitutional safe harbor and private litigants will consider a lack of planning a constitutional red flag.”⁸⁵

In the wake of *Kelo*, many lower courts have embraced planning as an important factor in “public use” analyses.⁸⁶ For example, in determining whether the taking of a farm was for a legitimate recreational purpose, the Supreme Court of Pennsylvania found the fact that there was no “suggestion that the Township has considered, let alone created, such a plan” militated heavily against the government’s position.⁸⁷ Likewise, the Maryland Supreme Court avowed that failure to provide evidence of a comprehensive economic redevelopment plan acts as a de facto indication of a condemnation’s illegitimacy.⁸⁸

3. Planning and Exaction Takings

Dolan seemingly found it important to distinguish “legislative determinations classifying entire areas of the city” from the “adjudicative decision” to “condition [an] application for a building permit on an individual parcel.”⁸⁹ That is, the Court strongly implied—if not expressly declared—that the strictures of *Dolan* (and by implication *Nollan*) are

the City of New London’s planning efforts—which were based at least in part on the promise of Pfizer constructing its headquarters on a parcel of land adjacent to the condemned properties at issue in the case—has been significantly criticized after Pfizer decided to relocate its plant outside of New London. See, e.g., Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Case*, N.Y. TIMES, Nov. 13, 2009, available at <http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html>. However, the failure of the development plan in New London very well may not have been due to poor planning projections, but instead due to the cloud of the *Kelo* litigation itself. See, e.g., Tom Blumer, *Pfizer Leaving New London CT; Just Don’t Mention Kelo While Reporting It*, NEWSBUSTERS (Nov. 10, 2009) <http://newsbusters.org/blogs/tom-blumer/2009/11/10/pfizer-leaving-new-london-ct-just-dont-mention-kelo-while-reporting-it>. Yet, at least for “public use” purposes, it seems of little import that the government’s plan proved prescient in any particular case, but rather whether the governmental entity had a sensible basis for the contours of its plan at the outset.

⁸⁵ See Garnett, *supra* note 66, at 454.

⁸⁶ See, e.g., Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV’T L. REV. 1, 28 (2011).

⁸⁷ See *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338–39 (Pa. 2007) (noting that, in *Kelo*, “the United States Supreme Court placed great weight upon the existence of a ‘carefully considered’ development plan . . .”).

⁸⁸ See *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324, 356 (Md. 2007) (“[W]hile economic development may be a public purpose, it must be carried out pursuant to a comprehensive plan.”).

⁸⁹ *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

inapplicable to exactions that are part of a community plan and broadly applicable.⁹⁰ In discussing its exactions jurisprudence in a subsequent decision, *Lingle v. Chevron U.S.A. Inc.*, the Court described *Nollan* and *Dolan* as involving “adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.”⁹¹ Several scholars have explained that this passage from *Lingle*, as well as dicta several years prior in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,⁹² seemingly echo the divide arguably set out in *Dolan*.⁹³

⁹⁰ See *id.*

⁹¹ 544 U.S. 528, 546–47 (2005).

⁹² 526 U.S. 687 (1999).

⁹³ See, e.g., Fenster, *Constitutional Shadow*, *supra* note 17, at 754–55; Fenster, *Takings Formalism*, *supra* note 17, at 628 (citing *Del Monte Dunes*, 526 U.S. at 702) (suggesting that dicta in *Del Monte Dunes* “seemed to limit nexus and proportionality to a subset of land use conditions” that are adjudicative in nature); Benjamin S. Kingsley, *Making It Easy to Be Green: Using Impact Fees to Encourage Green Building*, 83 N.Y.U. L. Rev. 532, 560–61 (2008); Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONS ENVTL. L. & POL’Y J. 189, at 212–14 (2010) (suggesting that there is a strong implication in the U.S. Supreme Court’s unanimous 2005 opinion in *Lingle* that the *Nollan* and *Dolan* tests do not apply to conditions imposed through the legislative process); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 107 n.55 (2002) (contending that *Del Monte Dunes* limits the application of *Nollan* and *Dolan* to individualized determinations); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 608–609, 612. But see J. David Breemer, *The Evolution of the “Essential Nexus”: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 401–02 (2002); James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 407–17 (2009) (arguing that *Lingle* supports subjecting legislatively-imposed exactions to heightened judicial scrutiny); David L. Callies & Christopher T. Goodin, *The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard After Lingle v. Chevron U.S.A., Inc.*, 40 J. MARSHALL L. REV. 539, 563–64 (2007); Steven J. Eagle, *Del Monte Dunes, Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10104 (2000) (“It seems highly unlikely that the Supreme Court would unanimously declare through dicta in *Del Monte Dunes* that the *Dolan* ‘rough proportionality’ principle should not develop to meet the exigencies of cases as they arise, much less to deal with deliberate municipal circumventions.”); Christopher T. Goodin, Comment, *Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: “A Distinction Without A Constitutional Difference,”* 28 U. HAW. L. REV. 139, 158–67 (2005); Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 501–21 (2006) (arguing that the Takings Clause does not distinguish between branches of government, such that legislative and adjudicative exactions should receive the same level of judicial scrutiny). Justices O’Connor and Thomas exhibited a preference for the latter view in dissenting from the Court’s

Understandably, the U.S. Supreme Court's rhetoric has led many lower courts to conclude that *Nollan* and *Dolan*'s "nexus" and "proportionality" tests do not apply to generally applicable exactions, but rather only to those individualized exactions imposed through an adjudicative process.⁹⁴

Such a text-based argument is buttressed by the rather persuasive claim that legislative exactions present considerably less risk of extortion-like government action than adjudicative exactions.⁹⁵ Legislatively-authorized

denial of a petition for certiorari in a matter where the Georgia Supreme Court declared that the heightened scrutiny of *Nollan* and *Dolan* is not applicable to legislatively-imposed exactions, but only to those that are adjudicatively-imposed. See *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117–19 (1995) (Thomas, J. & O'Connor, J., dissenting from the denial of certiorari).

⁹⁴ See, e.g., *Wolf Ranch, LLC v. City of Colorado Springs*, 207 P.3d 875, 880 (Colo. App. 2008), *aff'd*, 220 P.3d 559 (Colo. 2009) (holding that legislatively formulated exactions applying to broad classes of landowners do not require a showing of an essential nexus and rough proportionality); *McClung v. City of Sumner*, 548 F.3d 1219, 1227–28 (9th Cir. 2008) (holding that the *Nollan* and *Dolan* tests are inapplicable to cases that do not involve individual, adjudicative decisions nor the physical appropriation of private land). But see *B.A.M. Dev., L.L.C. v. Salt Lake Cnty.*, 128 P.3d 1161, 1170–71 (Utah 2006) (holding that prior to the enactment of a Utah statute codifying a "rough proportionality" treatment of all development exactions, *Nollan* and *Dolan* applied to both adjudicative decisions and general land-use ordinances). The Supreme Court of Maine concluded that the legislative nature of an exaction is just one factor in determining whether the *Nollan* and *Dolan* tests are applicable. See *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998) ("Our inquiry into rough proportionality does not end at this legislative determination, but we assign weight to the fact that the easement requirement derives from a legislative rule of general applicability and not an ad hoc determination made by the planning board at the time of the pending application.").

⁹⁵ See, e.g., Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 84 (2000) ("Judicial limits on land use bargains stem from a well-meaning protective impulse and a healthy skepticism of government . . ."). Thomas Merrill offers an alternative perspective. He suggests that the U.S. Supreme Court's heavy policing of permit conditions—apparently adjudicative or otherwise—may be justified by the fact that the exercise of the constitutional right at issue—the right to receive just compensation—comes with the concomitant public benefit of preventing the government from accumulating an "inefficiently large stockpile of land." See Merrill, *supra* note 36, at 869–79. See also Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 574–75 (1991) ("Why should [a government] employee not be allowed to contract away his speech rights freely? The answer . . . is that speech about government is a public good."). Merrill distinguishes cases raising this "stockpiling of land" concern from those cases in which judges perceive that an individual decision to waive a constitutional right has little bearing on the public, i.e., when there are few if any external benefits associated with the right at issue. Merrill, *supra* note 36, at 871–74. It is not clear whether or how this "constitutional rights as public goods" argument might necessitate broadening the current requirements for third-party standing in land use disputes.

exactions are not necessarily the same as exactions that are part of a comprehensive planning scheme, for the “weight” of land use plans varies widely across jurisdictions. Some jurisdictions require that all zoning and other land use decisions demonstrate strict consistency with adopted plans, making the distinction between planning-based and legislatively-authorized exactions insignificant.⁹⁶ Others, however, suggest that plans can be inferred from a collection of land use decisions made by a municipality⁹⁷ or that even a zoning ordinance itself can embody the “plan,”⁹⁸ such that comprehensive plans do not necessarily place specific parameters on exaction decisions in these jurisdictions. But the point here is that, whether exactions are classified as legislatively authorized or as components of a comprehensive land use plan, they generally comport with the fundamental land use policies of the community. In other words, these exactions are part of planning *process* that assesses local needs and objectives on a broader scale than merely a case-by-case basis.⁹⁹

As Mark Fenster explains, “an individualized process [for imposing exactions] poses a greater risk of an unfair bargaining process [when compared to legislative exactions] that will result in an undue burden falling on a property owner. [Only] [w]hen that risk is highest [do] the nexus and proportionality tests apply.”¹⁰⁰ This is so, as many scholars have suggested,

⁹⁶See, e.g., ME. REV. STAT. tit. 30-A, § 4352(2) (2011) (“A zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body . . .”). Amidst further evidence of the significance of planning, some federal funding—including, for instance, funding for urban renewal—is tied to local and state governments producing comprehensive plans.

⁹⁷See, e.g., *Udell v. Haas*, 235 N.E.2d 897, 902 (N.Y. 1968).

⁹⁸See, e.g., *Konigsberg v. Board of Alderman*, 930 A.2d 1, 19 (Conn. 2007).

⁹⁹See *Udell*, 235 N.E.2d at 900–01.

¹⁰⁰Fenster, *Constitutional Shadow*, *supra* note 17, at 755. But see Goodin, *supra* note 93, at 162 (“The argument that regulatory leveraging presents substantially less of a threat in the context of Legislative Exactions . . . is merely wishful thinking . . .”). If *Dolan* actually does abandon the traditional presumption of constitutionality made in the course of adjudication, but not in the course of legislation, the Court did not explain why it was doing so. Steven Johnson suggests:

When the judiciary reviews non-constitutional challenges to an agency action, the court accords the same level of deference to the agency’s decision regardless of whether the decision is made through adjudication or a rulemaking. Therefore, it is not clear why the level of deference accorded to the agency on constitutional questions should vary depending on whether the agency acted pursuant to its legislative or adjudicative authority.

because any community discomfort with exactions that are broadly applicable—like all other widespread laws—are subject to voter revolt through the ballot box.¹⁰¹ As one commentator describes it, “[w]here a city or county seeks to impose a condition across the board on thousands of property owners, [the property owners] are likely to have a say in the process.”¹⁰²

However, despite this apparent doctrinal and theoretical support for the legislative-adjudicative distinction, the distinction may suffer from two deficiencies. First, where conditions are not imposed on “thousands” but nevertheless have some breadth of applicability, drawing a line between “legislative” and “adjudicative” exactions is an extremely difficult task.¹⁰³ For example, certain development impacts today—including wetland and traffic impacts—are conducive in some ways to planning-based, broadly applicable exaction formulas.¹⁰⁴ Still, particularly in the wetlands context, such formulas cannot be too specific, in light of the multitude of variables associated with lost and created or restored wetland functionality (as opposed to sheer acreage) that must be considered in evaluating the adequacy of wetlands mitigation.¹⁰⁵

Mitigation after Dolan v. City of Tigard, 6 FORDHAM ENVTL. L. REV. 689, 719 (1994).

¹⁰¹ See, e.g., Siegel, *supra* note 93, at 611. See also *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004) (suggesting that it is “entirely possible that the government could ‘gang up’ on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others”); Rosenberg, *supra* note 7, at 208–09 (“By adopting ordinances embracing development impact fee regimes, local governments simultaneously achieve a series of attractive political objectives, and they do so without having to consider any potential objections from interest groups unrepresented in the existing voting populace.”).

¹⁰² See Fenster, *Constitutional Shadow*, *supra* note 17, at 754 (“The act of singling out a property owner for an individualized regulation makes the condition more suspect.”); Siegel, *supra* note 93, at 611.

¹⁰³ Fenster contends that the legislative-adjudicative line is particularly difficult to draw at the local level “where elected officials, who have less expertise than the typical federal and state administrative agency, make both legislative regulatory commands and administrative regulatory decisions, and where the legislative process is more subject to the political process failures of majoritarianism and factionalism.” Fenster, *Constitutional Shadow*, *supra* note 17, at 772. See also Ball & Reynolds, *supra* note 4, at 1562.

¹⁰⁴ Fenster, *Constitutional Shadow*, *supra* note 17, at 766–67.

¹⁰⁵ See Johnson, *supra* note 100, at 720–21; Titus, *supra* note 59, at 763. See also B.A.M. Dev., L.L.C. v. Salt Lake Cnty., 87 P.3d 710, 728 n.23 (Utah Ct. App. 2004) (“[S]ome exactions are somewhere in the middle of adjudicative and legislative because the legislature may give some guidelines, while the administrative body retains considerable discretion as well.” (internal

Is the application of, say, an ordinance establishing a wetlands mitigation formula “adjudicative” when that ordinance is put into operation—and conceivably negotiated, at least at the margins¹⁰⁶—in individual permitting cases?¹⁰⁷ If so, then very few exactions could be classified as legislative;¹⁰⁸ further, a significant portion of those that were—imagine a requirement that all development permits include a condition requiring a precise number (as opposed to a percentage) of affordable housing set-asides regardless of the size and scope of the permitted development—very well could be vulnerable to a host of other legal challenges. This resolution seems unworkable. On the other hand, if the application of exaction formulas is considered “legislative,” then it presumably would take little effort by elected officials to legislate *Nollan* and *Dolan* into near irrelevance by adopting broad blueprints under which permitting officials could continue to exercise at least some modicum of discretion while immune from “nexus” and “proportionality” review.¹⁰⁹ If “adjudicative” exactions included only unusually particularized exactions that are disconnected from any formula, plan, or policy, it seems the distinction between broadly applicable and adjudicative exactions could be fairly implemented; otherwise, the distinction is dispositively manipulable, which, as explained in the remainder of this section, is evident in *Nollan* and *Dolan* themselves.

The second deficiency, then, that the legislative-adjudicative distinction suffers from in the exactions context is perhaps more pressing should the

quotations omitted)), *aff'd in part, rev'd in part*, 128 P.3d 1161 (Utah 2006). In some sense, “every land use regulation ultimately must apply to individual parcels in specific factual contexts.” See Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1862 (2010).

¹⁰⁶See, e.g., Edward J. Sullivan, *Dolan and Municipal Risk Assessment*, 12 J. ENVTL. L. & LITIG. 1, 30 (1997) (“[Exaction] formula[s] should have some flexibility of application, so that if there are particular instances of inequitable application, an administrative process is available to smooth out the roughness of proportionality.”).

¹⁰⁷See, e.g., *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011) (involving a landowner’s claim that the application of a 10:1 wetlands mitigation ratio ran afoul of *Nollan* and *Dolan*).

¹⁰⁸See Ball & Reynolds, *supra* note 4, at 1563–64.

¹⁰⁹See *id.* at 1566–67 (suggesting that the legislative-adjudicative distinction is “underinclusive” because the lack of discretion in formula-based exactions schemes can lead to more, not less, landowner hardship, for individualized exactions can act like waivers of otherwise onerous regulations under which the requested development would simply be denied); Dana, *supra* note 40, at 1300.

Supreme Court ever agree to definitively decide the issue; that is, the legislative-adjudicative distinction is arguably belied by *Nollan* and *Dolan*'s facts. The *Nollan* majority paid little heed to the fact that the claimant purchased property in an area subject to an existing public access enhancement policy adopted pursuant to the California Coastal Act.¹¹⁰ In accord with this policy, the state's Coastal Commission required that all similarly situated owners facilitate the exercise of public trust rights by conferring a public walking corridor along the water's edge as a condition to new development.¹¹¹ And in *Dolan*, the city imposed the same obligations on the plaintiff that were required of all approved development "within and adjacent to the 100-year floodplain."¹¹² It was the legislative dedication requirement itself—not an adjudicative decision designating the amount of land to be dedicated—that the *Dolan* Court found constitutionally infirm.¹¹³

Moreover, each of the five state cases *Dolan* cited as the foundation for its "rough proportionality" test involved what easily could be considered legislative exactions.¹¹⁴ In *Collis v. City of Bloomington*, a Minnesota court upheld a municipal ordinance requiring a dedication of land or donation of money for parks and playgrounds because there was a reasonable relationship between the conditioned approval of the subdivision and the city's need for land.¹¹⁵ In *City of College Station v. Turtle Rock Corp.*, a Texas court found constitutional a city ordinance requiring either dedication of parkland or money in lieu thereof when subdividing land since it was

¹¹⁰CAL. PUB. RES. CODE § 30212(a) (West 2007). See also *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 857–58 (1987) (Brennan, J., dissenting) ("The Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty requires that the approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean.").

¹¹¹See *Dana*, *supra* note 40, at 1283–84.

¹¹²See *Dolan v. City of Tigard*, 512 U.S. 374, 379 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). See also *Johnson*, *supra* note 100, at 720 n.172.

¹¹³See *Dolan*, 512 U.S. at 385.

¹¹⁴Likewise, an oft-cited passage in *Nollan*—where the Court suggested that the California Coastal Commission's exaction amounted to an "out-and-out plan of extortion"—quotes an opinion of the New Hampshire Supreme Court in a case involving a legislatively-imposed monetary exaction. See *Nollan*, 483 U.S. at 837 (1987) (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981), *overruled by* *Town of Auburn v. McEvoy*, 553 A.2d 371 (N.H. 1988)).

¹¹⁵246 N.W.2d 19, 26 (Minn. 1976).

“substantially related” to the health, safety, and general welfare of the public.¹¹⁶ In *Call v. City of West Jordan*, a Utah court upheld an ordinance requiring dedication of seven percent of land proposed for subdivision to the city (or payment of an equivalent fee in lieu thereof) to be used for flood control or recreational facilities for the benefit of the city’s citizens because there was “some reasonable relationship to the needs created by the subdivision.”¹¹⁷ In *Jordan v. Village of Menomonee Falls*, a Wisconsin court upheld an ordinance requiring the dedication of land for schools or parks as a condition of subdivision approval in “the absence of contravening evidence” set forth by the sub-divider that the government’s action lacked a “reasonable basis.”¹¹⁸ And in *Simpson v. City of North Platte*, a Nebraska court found that a city ordinance requiring, as a condition of a building permit, a forty-foot right-of-way to be used at some indefinite point violated the state’s constitution because the property owner proved that the condition lacked any “reasonable relationship” to his requested construction.¹¹⁹

4. Planning and Takings Cases Involving Exactions for the Future

That *Dolan* cited the *Simpson* case favorably is telling. It is the only one of the many opinions cited by the *Dolan* majority as support for the “rough proportionality” standard where a state court actually found that an exaction violated a constitutional command. To expound on the brief description above, the dispute in *Simpson* involved a city ordinance that required developers seeking to erect or enlarge buildings to dedicate half of the adjacent street, as measured by the projected width of that street set forth in the city’s comprehensive plan.¹²⁰ *Simpson* leased property with the intention of constructing a fast-food restaurant on it, and challenged the ordinance as violative of the Nebraska Constitution’s Takings Clause.¹²¹

¹¹⁶ 680 S.W.2d 802, 805 (Tex. 1984).

¹¹⁷ 606 P.2d 217, 220 (Utah 1979). The court went on to declare that the ordinance “will redound to the benefit of the subdivision as well as to the general welfare of the whole community,” but that “[t]he fact that it does so, rather than solely benefiting the individual subdivision, does not impair the validity of the ordinance.” *Id.*

¹¹⁸ 137 N.W.2d 442, 447 (Wis. 1965).

¹¹⁹ 292 N.W.2d 297, 301 (Neb. 1980).

¹²⁰ *Id.* at 299.

¹²¹ Compared to its federal counterpart, the language of the Nebraska Constitution’s “Takings Clause” is particularly broad: “The property of no person shall be taken *or damaged* for public

According to the court, “none of the real estate [for the extension of that street] has been acquired by the City nor is there any indication as to when, if ever, such real estate will be acquired by the City.”¹²² The matter, then, involved an exaction that sought to address anticipated future public harms—the cumulative threats to public health and safety associated with traffic congestion that would result from projected future development on adjacent lands—to which Simpson would contribute.¹²³ Seen in this light, the only lower court takings finding that *Dolan* cited with favor involved an exaction for the future.

While the *Dolan* majority offered surface praise to long-term planning—the Court called the task of land use planning “commendable” and the city’s goals “laudable”¹²⁴—it simultaneously ignored the longstanding judicial deference to the practice.¹²⁵ *Nollan* and *Dolan*’s

use without just compensation therefor.” NEB. CONST. art. I, § 21 (emphasis added). The Federal Constitution’s Takings Clause states: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. The Nebraska Supreme Court asserted at the time that Simpson need not—indeed, could not—request a variance under the ordinance and then later challenge that ordinance as unconstitutional. *Simpson*, 292 N.W.2d at 302 (“The Simpsons were correct in refusing to seek a variance and, instead, testing the constitutionality of the ordinance.”). However, it is likely that, today, a landowner in Simpson’s position would have to pursue said variance in light of the exhaustion and finality requirements set forth by the U.S. Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 193 (1985).

¹²² *Simpson*, 292 N.W.2d at 300. The *Simpson* court favorably cited a pre-*Nollan* New Jersey appellate decision, wherein the New Jersey court said:

In short, for the [reasonable relationship] test to apply, thus making a compulsory dedication constitutionally valid, the *nexus* must be *rational*. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements—not for the purpose of “banking” the land for use in a projected but unscheduled possible future use.

Id. at 301 (quoting 181 Inc. v. Salem Cnty. Planning Bd., 336 A.2d 501, 506 (N.J. Super. Ct. Law Div. 1975)).

¹²³ See *Simpson*, 292 N.W.2d at 299.

¹²⁴ See *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994).

¹²⁵ That is, the *Dolan* Court explicitly pronounced what was implicit in *Nollan*: it departed from the general rule applicable to zoning and other land use controls that the burden properly rests on the challenging party to prove that the regulatory act at issue arbitrarily restricts a property right. *Id.* at 391 n.8. Instead, the Court declared that the government—as the

disregard for the role of exactions within a larger community scheme illuminates a rather extreme consequence: lower courts facing exaction takings claims may be prompted not only to ignore but to demonstrate an *aversion* to long-term planning. In effect, the finding of takings liability in exactions for the future cases faults governmental entities for *over*-planning.

In this way, the requirement that exactions bear immediate fruit creates a near per se rule against using exactions for the future to counter particular types of development impacts. This categorical rule emanates from the fact that it is almost impossible for governmental entities to meet the level of proof required in instances like those involving Branch Durant's development proposal in the hypothetical set out in Part II. Such is the case because there necessarily is some uncertainty in projecting the success of future land assembly (or overall community need) for roadway expansion, as well as the specific amount of public burdens forecast to occur from the applied-for development as a result of sea-level rise. In practice, then, the formalistic, demanding criterion of exaction takings law allows the imposition of exactions for only those burdens that are easily quantifiable in the present.¹²⁶ Demanding that local governments on limited budgets pay takings compensation for the likes of traffic-reducing rights-of-way and safety-inducing shore protection measures for future public benefit could allow some impacts of intensified land uses to go unmitigated.

As one scholar predicts, "Since *Kelo* encourages planning, more

defendant—bears the burden to justify the required exactions. *Id.* The *Dolan* majority's decision to abandon the traditional standard of deference afforded to local governments that have conducted considerable planning was not lost on Justice Stevens. In dissent, Justice Stevens asserted, "The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan." See *id.* at 405 (Stevens, J., dissenting). Justice Stevens' barb elicited only a conclusory response from the majority: "Justice Stevens' dissent takes us to task for placing the burden on the city He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation Here, by contrast, the city made an adjudicative decision In this situation, the burden properly rests on the city." *Id.* at 391 n.8. As discussed *supra* note 100, the Court did not explain *why* the traditional presumption of constitutionality should not apply to adjudicative decisions.

¹²⁶For a rare decision that arguably suggests the contrary, see *Oregon ex rel. Dep't of Transp. v. Altimus*, 905 P.2d 258 (Or. Ct. App. 1995) ("We do not think that *Dolan* requires the exclusion of all evidence of hypothetical conditions in circumstances . . . where it is relevant and responsive to evidence of potential development impacts and where the degree of proportionality is necessarily as 'speculative' as is the potential nature and existence of the hypothetical impacts and exactions themselves.").

planning will occur.”¹²⁷ But governmental entities seeking to employ the exactions tool to address cumulative future impacts have to walk a dizzying line: they presumably must search for a level of planning that is *enough* so as not to trigger traditional regulatory takings or “public use” concerns, but at the same time not *too much* planning so as to avoid triggering exaction takings liability.

B. Delineating Takings and Due Process Review

This section explains the second way in which the U.S. Supreme Court’s exaction takings jurisprudence responds to landowners’ concerns regarding assembly and forecasting uncertainty by adopting an approach that otherwise has been rejected in modern takings law. The relationship between due process and takings analyses has gone through several iterations over time.¹²⁸ As this fluctuation provides an important backdrop for the analysis herein, the section first explains how the Court’s exaction takings decisions now stand atop a jurisprudentially uncomfortable fence that divides due process and takings review. As one scholar asserts, *Nollan* and *Dolan*’s inquiry into regulatory reasons and reasonableness “smacks of constitutional Due Process” by requiring that exactions “substantially advance legitimate state interests.”¹²⁹ The section then examines the Court’s recent effort in *Lingle v. Chevron U.S.A. Inc.*, to preserve this due process-like inquiry inherent in its exactions jurisprudence. In *Lingle*, the Court suggested that *Nollan* and *Dolan* do not task courts with inquiring whether exactions substantially advance *some* legitimate state interest but only whether they substantially advance the *same* legitimate state interest that is threatened by the proposed development project.¹³⁰ The section concludes that takings decisions involving exactions for the future demonstrate that this “some”/“same” distinction is difficult to justify.

1. Early Due Process and Takings Fusion

During America’s first century, only physical appropriation of real or personal property by the government was considered constitutionally

¹²⁷ See Garnett, *supra* note 66, at 461.

¹²⁸ See *infra* notes 131–176 and accompanying text.

¹²⁹ See Fenster, *supra* note 54, manuscript at 10.

¹³⁰ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547.

prohibited without the payment of compensation.¹³¹ Yet the concept of constitutionally protected property changed in the late 1800s. First, the U.S. Supreme Court began to find compensable takings when government action rendered property unusable.¹³² More significantly in that era, the Court began developing a body of jurisprudence under which the Fourteenth Amendment's protection of property against deprivation without due process of law imposed substantive limits on economic regulations.¹³³ While this period for development of substantive limitations on economic regulations is most commonly associated with the U.S. Supreme Court's 1905 invalidation of a state law restricting the number of hours that a baker could work in *Lochner v. New York*,¹³⁴ the Court invalidated nearly two hundred economic regulations in the first three decades of the 1900s.¹³⁵ *Lochner* merely "symbolize[s] an era of conservative judicial intervention . . . seeking to stem the flow of social and economic reform."¹³⁶ According to the *Lochner*-era Supreme Court, "the 'letter and spirit' of the Constitution protected property from the legislature's 'meddlesome interferences.'"¹³⁷

¹³¹ See, e.g., *Callender v. Marsh*, 18 Mass. 418, 437 (1823) (finding that the regrading of a roadway that caused significant damage to an adjacent house through the removal of lateral support did not amount to an unconstitutional taking). Writing for the Court in 1992, Justice Scalia reiterated this historical detail. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (U.S. 1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of the owner's possession.'") (internal citations omitted). For excellent contemporary scholarship on this period, see, for example, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 71-74, 132 (1977); McUsic, *supra* note 36, at 612; Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 216-217 (1984); William Michael Treanor, *The Original Understandings of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995).

¹³² *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1871) (holding that permanent flooding authorized by legislation constituted a compensable taking).

¹³³ See McUsic, *supra* note 36, at 612-14.

¹³⁴ 198 U.S. 45, 53 (1905).

¹³⁵ See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT*, 67-120 (Sanford Levinson ed., 4th ed. 2005); ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 117-37 (1987).

¹³⁶ Cox, *supra* note 135, at 131.

¹³⁷ McUsic, *supra* note 36, at 611 (quoting *Coppage v. Kansas*, 236 U.S. 1, 23 (1915); *Lochner*, 198 U.S. at 61).

Economic value—“expected earning power,”¹³⁸ taxes on real estate income,¹³⁹ the ability to contract to acquire land,¹⁴⁰ service contracts,¹⁴¹ etc.—became the metric of property. Regulations affecting that value deprived individuals of property without due process of law, which was equivalent in the Court’s view to “taking” property.¹⁴² As economic value necessarily is rooted in property owners’ expectations, the constitutional protection of such value conceivably could have frozen the common law in its tracks in this way: because legislative alterations of common law principles would affect owners’ expectations, such alterations theoretically could be considered unconstitutional.¹⁴³

However, the Court did not go so far. Instead, while it invalidated a significant number of laws, as noted above,¹⁴⁴ it also affirmed many other legislative acts modifying the common law, declaring such acts to be appropriate exercises of the “police power” to safeguard the health, safety, and welfare of the public.¹⁴⁵ In essence, then, the *Lochner* era’s judicial intervention fusing takings and due process analysis (i.e., “meddlesome interferences” versus the “police power”) bore two traits: (1) it entailed a considerable degree of judicial scrutiny of the relationship between the regulatory approach and the regulatory goals (means-ends), and (2) it

¹³⁸ See John R. Commons, *Legal Foundations of Capitalism* 16 (1924) (discussing the Supreme Court’s holding in *Chi., Milwaukee, & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890)).

¹³⁹ See *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 618 (1895).

¹⁴⁰ See *Holden v. Hardy*, 169 U.S. 366, 391 (1898).

¹⁴¹ See *Adkins v. Children’s Hosp. of the D.C.*, 261 U.S. 525, 545 (1923).

¹⁴² *McUsic supra* note 36, at 614 (“The criteria for determining when the state deprived an individual of a due-process-protected property right became interchangeable with the criteria for determining when private property had been taken.”).

¹⁴³ See, e.g., *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 429 (1927) (holding that a rate regulation impairs an owner’s ability to fix the price at which property is sold or used—an “inherent attribute of the property itself”).

¹⁴⁴ See *supra* note 135 and accompanying text.

¹⁴⁵ See, e.g., *Crowley v. Christensen*, 137 U.S. 86, 90 (1890) (“[A]s to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property.”); *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) (“A prohibition simply upon the use of property for purposes that are deduced, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.”); *Munn v. Illinois*, 94 U.S. 113, 125 (1876) (“Under [the police power] the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.”).

required a significant connection between the harm caused by a particular property owner and the burdens of regulation that that property owner bore (cause-and-effect).¹⁴⁶

In the mid-1930s, the U.S. Supreme Court abandoned the searching federal judicial review of many economic regulations under the rubric of substantive due process.¹⁴⁷ The Court asserted it would overturn, on due process grounds, only those regulations that fail to rest "upon some rational basis."¹⁴⁸ Yet it did not explicitly reject a more probing review under the Takings Clause,¹⁴⁹ leaving unclear whether takings analysis would revert to its original and narrow focus on physical appropriations; maintain its link to the now abandoned, probing due process review; or blaze a new trail.¹⁵⁰

The dawn of modern regulatory takings jurisprudence in the late 1970s at least proved that the Takings Clause would not be confined to its original scope.¹⁵¹ In *Penn Central Transportation Co. v. City of New York*, the U.S. Supreme Court suggested in dicta that substantive, means-ends review of a regulation's validity might continue to be appropriate in takings analyses.¹⁵² Two years later, in *Agins v. City of Tiburon*, a unanimous Court drew on *Penn Central's* dicta to declare that a land use regulation restricting development density did not constitute a taking.¹⁵³ The *Agins* Court explained that its holding rested on the finding that the regulation at issue "substantially advanced" the legitimate state interest of discouraging "premature and unnecessary conversion of open-space land to urban

¹⁴⁶ McUsic, *supra* note 36, at 620–32.

¹⁴⁷ See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

¹⁴⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). Indeed, for nearly sixty years, the Court did not overturn legislation under this standard, a streak that ended with the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁴⁹ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922) (asserting that regulations that go "too far" amount to unconstitutional takings).

¹⁵⁰ As John Echeverria explains, "Because the Takings Clause was not a primary vehicle for searching judicial review of economic regulations in the *Lochner* era, takings doctrine never underwent the revisionist interpretation that the Due Process Clause did." See John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853, 879 (1999).

¹⁵¹ See Fenster, *Constitutional Shadow*, *supra* note 17, at 759.

¹⁵² 438 U.S. 104, 127 (1978) ("It is, of course, implicit . . . that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . .").

¹⁵³ See *Agins v. City of Tiburon*, 447 U.S. 255, 260–62 (1980).

uses.”¹⁵⁴

The *Agins*’ Court asserted that its “substantially advance” test derived, at least in part, from two *Lochner*-era land use cases.¹⁵⁵ *Agins*’ *Lochner*-like melding of the Takings and Due Process Clauses produced the following result: the judiciary, in adjudicating a takings claim, could invalidate and enjoin legislation on the basis that the law does not “substantially advance a legitimate state interest,” without regard to whether the challenged legislation diminishes the economic value or usefulness of any property.¹⁵⁶ This judicial power threatened a reinstitution of the intrusive, late-nineteenth and early twentieth century review of regulatory efforts through the guise of the Takings Clause.¹⁵⁷

After more than two decades of select scholarly commentary criticizing *Agins*’s errant, outdated mixture of due process and takings analyses,¹⁵⁸ the Court finally—and unanimously—admitted its error.¹⁵⁹ The 2005 case of

¹⁵⁴ *Id.* at 261.

¹⁵⁵ *Id.* at 261–62.

¹⁵⁶ See Echeverria, *supra* note 150, at 877.

¹⁵⁷ *Id.* at 879.

¹⁵⁸ See, e.g., Kenneth Bley, *Substantive Due Process and Land Use: the Alternative to a Takings Claim*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 289, 291 (David L. Callies ed., 1996); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 696 (1993); Echeverria, *supra* note 150, at 854; Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 714 (2002); Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1605–14 (1988); Kenneth Salzberg, “*Takings*” as *Due Process*, or *Due Process* as “*Takings*”?, 36 VAL. U. L. REV. 413, 414 (2002); Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don’t*, 12 U. PUGET SOUND L. REV. 339, 351–52 (1989). Justice Kennedy had, a decade before *Lingle*, suggested the same. See *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (suggesting that in instances where the constitutionality of legislation turns on “the legitimacy of Congress’ judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause. . . . [The Court should] reserv[e] takings analysis for cases where the governmental action is otherwise permissible.”). See also *id.* at 554–56 (Breyer, J., dissenting) (“[A]t the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes ‘private property’ to serve the ‘public’ good. . . . [T]here is no need to torture the Takings Clause [to house claims of arbitrariness that have a] natural home in the Due Process Clause . . .”).

¹⁵⁹ At oral argument, Justice Scalia suggested the court was going to have to “eat crow” in rejecting the twenty-five year-old *Agins* test. See Transcript of Oral Argument at 21, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (No. 04-163). Justice O’Connor’s opinion for the

Lingle v. Chevron U.S.A. Inc., an opinion authored by Justice O'Connor, explicitly abandoned the *Agins* test for regulatory takings purposes.¹⁶⁰

Post-*Lingle*, it now seems relatively clear that, at least in most instances, the validity of government action is a due process inquiry that necessarily is precedent to a takings analysis.¹⁶¹ *Lingle's* separation of due process and takings analyses is important for several reasons. First, a successful takings claim mandates a financial remedy,¹⁶² while a successful due process claim results in injunctive relief.¹⁶³ Second, whether a challenge to government action is brought on a due process theory or a takings theory may affect the types of defenses that are available to the regulating entity.¹⁶⁴ Third, the elimination of "substantial advancement" takings claims relegates most challenges to the merits of governmental action to the judiciary's substantive due process jurisprudence and the attendant deferential rational basis review.¹⁶⁵ If a regulation fails a means-ends test and is thus illegal on a due process (or any other) basis, that finding very well may preclude takings liability because no amount of compensation should be able to authorize an invalid action.¹⁶⁶

unanimous Court opened, "On occasion, a would-be doctrinal rule or test [here, the "substantially advance" test] finds its way into our case law through simple repetition of a phrase—however fortuitously coined." *Lingle*, 544 U.S. at 531. The decision concludes, "Twenty-five years ago, the Court posited that a regulation of private property 'effects a taking if it does not substantially advance a legitimate state interest.' The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course." *Id.* at 548 (internal citation omitted).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 543.

¹⁶² See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Where a claimant is successful in challenging an exaction as an unconstitutional taking, the compensation due theoretically should amount only to the extent of the excess, not the fair market value of the exacted property as a whole.

¹⁶³ See, e.g., *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

¹⁶⁴ See *Echeverria*, *supra* note 150, at 880.

¹⁶⁵ However, to the extent the "substantially advance" test remains viable for some takings purposes, the required fit between the government's means and its ends may be stronger—and thus demand more from the government—than the required fit for due process purposes. See *id.* at 878 ("[T]he [due process/takings] label might matter if, in affirming the means-ends test as part of takings analysis, the Supreme Court were to formulate the test to be more demanding of government than the modern, deferential due process means-ends test.").

¹⁶⁶ See *id.* at 876–77. Some might suggest that a claimant could waive a challenge to the validity of the governmental act in order to proceed with a takings claim. However, such a theory arguably is belied by the possibility of a third party challenging the validity of that same act in a

2. The Due Process Footing of Exaction Takings Jurisprudence

Though the Supreme Court had not relied on the “substantially advance” test in many takings disputes after *Agins*, the test did serve a principal role in both *Nollan* and *Dolan*.¹⁶⁷ Seemingly, both *Nollan* and *Dolan* indicated that governmental demands lacking sufficient reasons can constitute a compensable taking of property, which is specifically what the *Lingle* Court subsequently said was not an appropriate takings yardstick.¹⁶⁸ In *Nollan*, the Court described the “substantially advance” test as scrutinizing (1) whether the regulatory act achieves its stated purpose¹⁶⁹ and (2) whether there is a significant link between the regulatory burden the landowner bears and the harm to the public caused by that landowner.¹⁷⁰ *Dolan* formalized and strengthened the latter requirement by concluding that it is not enough that a regulatory act prevent public harm attributable to the approved development; it must do no more than proportionally counter

separate proceeding. See John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1083–84 (2000).

¹⁶⁷ *Nollan* stated that the government’s access corridor condition “utterly fail[ed] to further the end advanced as the justification for the prohibition.” *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987). Likewise, *Dolan* asserted, “A land use regulation does not effect a taking if it ‘substantially advances legitimate state interests’ and does not ‘deny an owner economically viable use of his land.’” *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (internal citation omitted). There was no claim in *Nollan* or *Dolan* that the development condition at issue denied the property owner all economically viable use of the claimant’s land; indeed, the claimants presented no evidence of any economic impact at all. See *infra* note 185.

¹⁶⁸ Jamison E. Colburn, *Splitting the Atom of Property: Rights Experimentalism as Obligation to Future Generations*, 77 GEO. WASH. L. REV. 1411, 1441 (2009). See also Daniel Pollak, *Regulatory Takings: The Supreme Court Tries to Prune Agins Without Stepping on Nollan and Dolan*, 33 ECOLOGY L.Q. 925, 929 (2006).

¹⁶⁹ *Nollan*, 483 U.S. at 837. As explained *supra* notes 41–42 and accompanying text, the Court concluded that the exaction at issue—a public easement along the beach—did not in any way serve its regulatory purpose of reducing “obstacles to viewing the beach.” As discussed *supra* note 42, however, the Court selected merely one purpose—improving visual access—of several that the permitting entity had explicitly identified, and refused to reasonably infer other public purposes not explicitly identified.

¹⁷⁰ *Nollan*, 483 U.S. at 835 n.4, 838 (demanding a relationship between the regulation at issue and “the public need . . . that the Nollans’ new house creates or to which it contributes”). As Justice Scalia later described it, the “substantially advance” test requires a “cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.” *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

the public harm caused by the applicant's development project.¹⁷¹ Such an understanding of the "substantially advance" test closely parallels the means-ends and cause-and-effect relationships that, as described above, were examined by the judiciary in the course of due process analyses in the now-rejected *Lochner* era.¹⁷²

One might imagine, therefore, that *Lingle's* refutation of *Agins'* "substantially advance" test necessitated the Court's overruling *Nollan* and *Dolan*, as well.¹⁷³ However, *Lingle* largely left the core of the Court's exactions takings jurisprudence intact.¹⁷⁴ The *Lingle* Court suggested that the *Nollan* and *Dolan* tests are "worlds apart" from the *Agins* test.¹⁷⁵ The Court's attempt to distinguish the two rested on the fact that the *Agins* test assessed whether *some* legitimate state interest is substantially advanced by a given regulation, while the *Nollan* and *Dolan* tests assess only whether the proffered exaction substantially advances the *same* legitimate state interest that is threatened by the proposed development project.¹⁷⁶

¹⁷¹ *Dolan*, 512 U.S. at 391.

¹⁷² Douglas Kmiec describes *Nollan* as calling for a "closeness of fit between means and ends" and demanding that "the burden of the regulation is properly placed on *this* landowner." See Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1651 (1988). See also Michelman, *supra* note 158, 1607-08 ("[T]he Court expressly endorsed a form of semi-strict or heightened judicial scrutiny of regulatory means-ends relationships in the course of invalidating, as a taking, the Commission's conditional regulatory imposition on the Nollans."). Thomas Merrill suggests that *Dolan's* rough proportionality standard "appears to incorporate elements of both least restrictive means analysis and cost-benefit analysis." See Merrill, *supra* note 36, at 868.

¹⁷³ See Lauren Reznick, Note, *The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron*, 87 B.U. L. Rev., 725, 747 (2007).

¹⁷⁴ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

¹⁷⁵ *Id.* at 545-48.

¹⁷⁶ See *id.* at 547 ("In neither [*Nollan* nor *Dolan*] did the Court question whether the exaction would substantially advance *some* legitimate state interest. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether.") (internal citations omitted). In an amicus brief filed in support of the State of Hawaii, the Solicitor General of the United States pressed this very distinction. See Brief for the United States as Amicus Curiae Supporting Petitioners at 27-28, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (No. 04-163), 2004 WL 2787143 at *27-28 ("Because the governmental bodies in *Nollan* and *Dolan* sought to use the landowners' planned development activities to justify uncompensated exactions that would otherwise have violated the Constitution, the Court required a heightened showing, not simply that the permit conditions would advance *some* state interest, but that they would alleviate germane problems, *i.e.*, problems caused by the permitted development activities themselves."). The State of Hawaii advocated for

3. The Due Process-Takings Distinction and Exactions for the Future

If the Court is correct on this “some”/“same” distinction, then it seems that considering whether an exaction actually will produce its anticipated public benefits is not relevant in analyzing an exaction takings claim. Rather, the only apparent relevant inquiries would be (1) whether the exaction served the *same* interest threatened by the development, and (2) whether the public cost of those harms attributable to the proposed development is roughly the *same* as the cost of the burden borne by the applicant through the exaction.¹⁷⁷

These inquiries may represent the bounds of *Nollan* and *Dolan* review in those cases involving exactions that confer obvious and immediate benefits. To draw on an example offered earlier, one such case might involve development that blocks a vertical access way to a public beach, where the exaction demands a similar, alternative right-of-way to that beach.¹⁷⁸ However, consideration of takings claims in the context of exactions for the future demonstrates that *Nollan* and *Dolan* can demand far more than “same-ness”—they require scrutinizing more broadly the means and ends of a regulatory decision well beyond the traditional deference afforded to such acts under post-*Lochner* era substantive due process jurisprudence.¹⁷⁹

a different distinction, contending that *Nollan* and *Dolan* “are not traditional regulatory takings cases at all; rather, they stand at a unique intersection of physical-occupations law and the unconstitutional conditions doctrine. [*Nollan* and *Dolan*] rest on their own foundations as a means to address the potential for abuse in government exactions in the permitting context and have little significance outside that unusual domain.” Brief for Petitioners at 35, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (No. 04-163), 2004 WL 2811060 at *35. Even if the State felt that *Nollan* and *Dolan* were in error given their reliance on the *Agins* “substantially advance” test, asking the *Lingle* Court to reverse not one but three of its holdings of the past twenty-five years (*Agins*, *Nollan*, and *Dolan*) might have run the risk of demanding so much that the State could fail on its primary goal of avoiding takings liability for the rent control statute at issue.

¹⁷⁷ As noted above, however, the variables appropriate for comparison under *Dolan*’s “rough proportionality” analysis are not necessarily settled. See *supra* note 36 and accompanying text.

¹⁷⁸ See *supra* note 40 and accompanying text.

¹⁷⁹ One commentator pondered whether the preservation of *Nollan* and *Dolan* in *Lingle* was a “force[d] . . . distinction.” See Sarah B. Nelson, Case Comment, *Lingle v. Chevron USA, Inc.*, 30 HARV. ENVTL. L. REV. 281, 290 (2006). See also Colburn, *supra* note 168, at 1442 n.157 (describing the distinction as “shaky”). But see Echeverria, *supra* note 66, at 40 (concluding that *Lingle* provides a “neat, narrow definition of the scope of the *Dolan* and *Nollan* tests”). Though Justice Stevens signed on to the *Lingle* opinion, it would appear that, unless his perspective

The exactions at issue in the hypothetical involving Branch Durant set forth in Part II are instructive. With respect to the exacted dedication for roadway expansion, whether the same-ness required by *Nollan* is satisfied is difficult to dispute. That a new condominium complex would contribute to increased traffic is patent, and, in theory, there can be little doubt that supplementing a road with additional lanes can improve traffic conditions.¹⁸⁰ That evident connectivity leaves, under the “same-ness” approach, only the assessment of how much the exaction would cost the developer and a comparison of that cost to the public cost of the traffic problems the developer will create.¹⁸¹ *Dolan* asks whether those costs are roughly the same—whereby the exaction is appropriate—or whether, instead, the government has asked for too much.

Yet the foregoing analysis suggests that *Nollan* and *Dolan* demonstrate that there is an additional question of interest: whether the roadway exaction ultimately *will* substantially advance *some* legitimate state interest at all. This additional inquiry is borne out, if implicitly, in *Nollan* and *Dolan* themselves,¹⁸² as well as in the numerous lower court applications of *Nollan* and *Dolan* that have found takings liability for exactions tied to anticipated assembly of neighboring lands for future roadway expansion on facts not too dissimilar from those in the Branch Durant hypothetical offered above.¹⁸³ In this light, land use regulations taking the form of

changed in the intervening decade, he might not have found *Lingle's* ruminations on *Nollan* and *Dolan* altogether sound. See *Dolan v. City of Tigard*, 512 U.S. 374, 410 (Stevens, J., dissenting) (“In its application of what is essentially the doctrine of substantive due process, the [*Dolan* majority] confuses the past with the present.”).

¹⁸⁰The *Dolan* Court, however, expressed concern as to whether a bike path would reduce traffic. In *Dolan*, the city had calculated that the increased size of the retail store would add 435 car trips to the area per day. *Dolan*, 512 U.S. at 395–96. The Court apparently desired an estimate of how many car trips use of the bicycle path would avoid. *Id.* (contending that the city must demonstrate that the public pedestrian and bicycle path “*will, or is likely to*”—as opposed to “*could*”—address the projected traffic congestion) (quoting *Dolan v. City of Tigard*, 854 P.2d 437, 447 (Or. 1993) (Peterson, C.J., dissenting)).

¹⁸¹As discussed *supra* note 36, the variables appropriate for comparison under *Dolan's* “rough proportionality” analysis are not settled. For instance, one scholar has argued that the costs to the developer—the “foregone opportunity costs of the exaction”—should be compared not to the external public costs of the proposed development but rather to the “expected reduction” in these public costs that is generated by the exaction. See Merrill, *supra* note 36, at 885. For purposes of this section, the part of the *Dolan* analysis within which a probing substantive review is cabined is not as important as the fact that such a review is part of the *Dolan* analysis at all.

¹⁸²See *supra* notes 169–71 and accompanying text.

¹⁸³See, e.g., *Burton v. Clark Cnty.*, 958 P.2d 343, 357 (Wash. Ct. App. 1998) (awarding

exactions for the future are susceptible to being declared unconstitutional in a manner akin to the judicial dissolution of economic and other social regulations of *Lochner's* bygone era.¹⁸⁴

The analysis is similar with respect to the dedication exacted from Durant for shore protection purposes. That Durant's proposed development will, for instance, destroy existing sand dunes that have shore protection value is evident; therefore, the dedications almost certainly serve the same shore protection interest as that threatened by the development project, and thus survive *Nollan's* same-ness scrutiny. Only if the costs of these dedications exceed the public costs of the harms Durant is imposing on the public—*Dolan's* same-ness scrutiny—should takings liability presumably attach. Yet *Nollan* and *Dolan* again go beyond assessing those same-ness relationships. While curiously disregarding the overall economic burden the exactions place on Durant—a relevant consideration in all other takings contexts¹⁸⁵—they require a heightened, due process-like inquiry into the

takings compensation because the exacted right-of-way for a piece of an emergency connector road could be a "road to nowhere" since the adjacent development, and thus the planned road, might never be constructed); *Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. 1998) (finding city liable for a taking for conditioning a rezoning request on a dedication for roadway expansion, for any significant additional traffic would only be generated—and the roadway expanded—"at some unknown point in the future"); *Town of Flower Mound v. Stafford Estates Ltd. P'ship.*, 135 S.W.3d 620, 635 (Tex. 2004). But see *McClure v. City of Springfield*, 28 P.3d 1222, 1228 (Or. Ct. App. 2001) ("If each property owner could avoid an exaction because the city had not yet obtained all dedications necessary to improve the street, no improvement would be possible."); *Art Piculell Grp. v. Clackamas Cnty.*, 922 P.2d 1227, 1236 (Or. Ct. App. 1996); *Sparks v. Douglas Cnty.*, 904 P.2d 738, 746 (Wash. 1995) (en banc).

¹⁸⁴Though likely in rarer circumstances, the "some"/"same" distinction could even be unjustifiable in cases involving exactions that *do* confer obvious and immediate benefits. For instance, consider a landowner's application to develop a large restaurant on his vacant tract. The restaurant admittedly will increase traffic congestion in the area. If the local government conditioned that permit on the landowner dedicating a small speck of land for the erection of a sign reading, "There are now more cars in the area due to this restaurant. Be careful.," the same-ness tests likely are not violated: the sign serves the same interest (traffic) as that threatened by the development, and the cost to the developer in dedicating this speck of land is likely far less than the cost to the public in the form of increased traffic resulting from the landowner's restaurant. However, exaction takings review very well could also involve an inquiry into whether the means—the sign—would substantially advance the government's end of reducing traffic. For a discussion of the debate surrounding the variables appropriate for comparison under *Dolan's* "rough proportionality" analysis, see *supra* note 36.

¹⁸⁵See, e.g., *Dolan*, 512 U.S. at 385 n.6 ("Petitioner assuredly is able to derive *some* economic use from her property."); *id.* at 402 (Stevens, J., dissenting) ("Dolan . . . has offered no evidence that her burden of compliance has any impact at all on the value or profitability of her

wisdom of the government's actions. In other words, they require a probing judicial inquiry into whether the ocean-side exactions actually ever will do any public good at all.¹⁸⁶

That the answer to this inquiry is commonly in the negative is not altogether surprising in light of the aforementioned judicial wariness of governmental forecasting in the exactions context and the fact that the government, even though sitting as the defendant, bears a steep burden of proof in exaction takings cases. Effectively demanding that exactions demonstrate an immediate and assuredly successful response to a public problem reveals that *Lingle's* distinguishing between an exaction's substantial advancement of "some" legitimate state interest and an exaction's substantial advancement of the "same" legitimate state interest threatened by the proposed development is difficult to justify. The probing substantive judicial review that *Nollan* and *Dolan* command puts into constitutional jeopardy any exactions that intend to benefit the broader community at the future moment in time when cumulative impacts of a current development proposal converge with other anticipated development or events.

IV. EXACTIONS FOR THE FUTURE: AN ALTERNATIVE MODEL

The preceding Parts of this article have highlighted the practical concerns that landowners have with the government's exacting dedications for the future—assembly and forecasting uncertainty¹⁸⁷—and analyzed how those practical concerns are reflected in exaction takings jurisprudence.¹⁸⁸ It is quite possible that *Nollan*, *Dolan*, and their progeny should be reconsidered in light of their above-described break with several key principles underlying traditional takings law. The aforementioned themes

planned development."); *McUsic*, *supra* note 36, at 608 (contending that *Nollan* and *Dolan* protect not market value but rather some apparently fundamental interest in controlling land); J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 247 (1990) (suggesting that in *Nollan*, the majority "put economic losses to the owners to one side" and "said little about [it]"). Consideration of the economic burden on permittees had previously been considered relevant by many state courts in assessing takings challenges to exactions. *See, e.g.*, *E. Neck Estates, Ltd. V. Luchsinger*, 305 N.Y.S.2d 922 (App. Div. 1969) (finding an exaction unreasonable because it would have diminished by \$90,000 property valued at just over \$200,000).

¹⁸⁶ *See supra* note 179 and accompanying text.

¹⁸⁷ *See supra* Part II.B–C.

¹⁸⁸ *See supra* Part III.

that are unique to exaction takings law—an aversion to planning¹⁸⁹ and a reversion to a rather probing judicial review of a regulation's efficacy¹⁹⁰—can contribute to rather extreme results: a permitting official's fear of encumbering his or her agency with an exaction taking could expose landowners to more outright application denials;¹⁹¹ conversely, these fears could result in the equally socially detrimental result of the government's conferring unconditional approvals—i.e., waiving its regulatory responsibility—for projects with anticipated negative, if temporally distant, community impacts.¹⁹² Ironically, the very exaction system that was designed to bring about an outcome serving the interests of all parties often can have precisely the opposite effect.¹⁹³

However, while retreating from *Nollan* and *Dolan* for these reasons may be prudent, this article assumes that the above-depicted themes unique to current exaction takings law will continue to stand as considerable restraints on exactions—and particularly exactions for the future—moving forward. In light of this assumption, local governments seeking to insulate themselves from takings liability must consider slightly more creative approaches than the mere imposition of traditional dedication and easement requirements to counter future cumulative impacts to which development is expected to contribute.

One such alternative, conceptual approach is outlined in this Part. This

¹⁸⁹ See *supra* Part III.A.

¹⁹⁰ See *supra* Part III.B.

¹⁹¹ See Byrne & Grannis, *supra* note 3, at 15 (“Governments dread regulatory takings litigation, which can be uncertain, lengthy, expensive, and, fairly or not, stigmatizing.”); Fenster, *Takings Formalism*, *supra* note 17, at 665 (suggesting that, in risk-averse jurisdictions with the political will to deny development permits outright, “the property owner is significantly worse off than if she could bargain freely with the local government over conditions that might win an approval”).

¹⁹² See, e.g., Jonathan M. Davidson et al., “Where’s Dolan?”: *Exactions Law in 1998*, 30 URB. LAW. 683, 697 (1998) (suggesting *Nollan* and *Dolan* create a “chilling effect” on local governments’ use of exactions). These waivers predictably would confer an unfair windfall on particular property owners at the public’s expense. Third-party suits to challenge such waivers have faced mixed results. Compare *Dudek v. Umatilla Cnty.*, 69 P.3d 751, 758 (Or. Ct. App. 2003) (rejecting a neighbor’s challenge where the county waived road widening and improvement requirements for fear that imposing the requirements might violate *Dolan*’s proportionality threshold), with *McAllister v. Cal. Coastal Comm’n*, 87 Cal. Rptr. 3d 365, 384 (Cal. Ct. App. 2009) (concluding that the record did not support the Coastal Commission’s defense of its issuance of a permit allowing erection of a house in an environmentally sensitive area on the ground that failure to issue the permit would have been a compensable taking).

¹⁹³ See Mulvaney, *supra* note 2, at 308–09.

approach involves temporally segmenting the government's sought after interest. Instead of conditioning development permits on a present dedication or easement, a local government might condition development approval on a future interest that will become possessory only upon the happening of stated events.¹⁹⁴ Below, Section A first illustrates this unconventional approach to exaction imposition. It explains how temporal segmentation in the exactions context responds to the assembly, forecasting, and other landowner concerns outlined above, while reducing the prospects of takings disputes without necessarily sacrificing public objectives. Thereafter, Section B explores two potential downsides of this approach, which surround spoliation and enforceability. Section C provides a brief summary. The proposal outlined herein is to be viewed merely as a potential "compromise" position: it respects the existing if peculiar constitutional constraints on exactions, while avoiding both (1) unfairly burdening permit applicants with excessive exactions or denials, and (2) unfairly bestowing windfalls on landowners in the form of unconditioned permits.

A. Temporal Segmentation in the Context of Exactions

The following alternative approach to exaction imposition could open the door for reasonable implementation of exactions aimed at anticipated, future harms while reducing some takings liability concerns. While an articulation of the full practical details of this approach is fodder for future scholarship, this section describes the theory's basic workings and advantages.

Facing a land use application, the state might require the developer to confer an interest in the relevant segment of land that gives the state possession of that land only if and when specified triggering events occur.

¹⁹⁴The proposal herein relies on several thoughtful articles by James Titus regarding the possibility of outwardly condemning "rolling" easements to counter sea-level rise along bay front shores, as well as the work of Joseph Sax, Peter Byrne, and others who have built on Titus's scholarship. See James G. Titus, *Rolling Easements*, U.S. ENVIRONMENTAL PROTECTION AGENCY, (June 2011), <http://www.epa.gov/cre/downloads/rollingeasementsprimer.pdf> [hereinafter Titus, *Rolling Easements*]; Titus, *supra* note 59, at 718; James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1285 (1998) [hereinafter Titus, *Rising Seas*]; Joseph L. Sax, *The Fate of Wetlands in the Face of Rising Sea Levels: A Strategic Proposal*, 9 UCLA J. ENVTL. L. & POL'Y 143, 148 (1991); Byrne & Grannis, *supra* note 3, at 36.

To facilitate the imposition of this exaction, then, the landowner's estate must be temporally partitioned.¹⁹⁵

Though not described in these terms, some jurisdictions already have implemented temporal partition models in the context of conditioning permits. In Hawaii, for example, an impact fee statute requires local and state governments to refund impact fees to the developer or the developer's successor if they are not expended within six years.¹⁹⁶ In other words, the payee—the state—holds the present interest in the paid fee, while the payor—the landowner—retains a future interest that becomes possessory when the state does not use that fee within the noted time period.¹⁹⁷ The

¹⁹⁵Such an arrangement could take several forms under property's complicated system of estates. In some instances, the state's future interest would become possessory automatically upon the happening of the triggering event, requiring action on the state's part only if it did not intend to keep possession of its interest. See generally Lewis M. Simes, *Fifty Years of Future Interests*, 50 HARV. L. REV. 749 (1937). In others, the state's future interest would require an affirmative act on the part of the state in order for the state's interest to become possessory. See Roger W. Andersen, *Present and Future Interests: A Graphic Explanation*, 19 SEATTLE U. L. REV. 101, 114–15 (1995) (describing two general groups of future interests, including those "aggressive" future interests that divest other interests and those "patient" future interests waiting for natural expiration of a present interest). In jurisdictions where the common law rule against perpetuities remains applicable, the property owner might convey the relevant strip of land to the state in fee, with the understanding that the state would then convey a present possessory interest back to the landowner. See Jessie Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1705 (1985) (explaining that reversionary interests in the grantor generally are exempt from the rule against perpetuities). Should the landowner convey the strip of land to the state on the promise that the state return a present interest to the landowner conditioned on a right to re-enter, such an arrangement is somewhat analogous to the state retaining an option in a dedication or easement if and when a particular event occurs. In this sense, contracts, as opposed to property, precepts could dictate the parties' relative interests.

¹⁹⁶See Haw. Rev. Stat. Ann. § 46-144(5) (LexisNexis 2007). Local governments have instilled similar expiration periods. See, e.g., *Home Builders & Contractors Ass'n v. Bd. of Cnty. Comm'rs*, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983) (discussing a county ordinance that required impact fees placed into a trust fund to be spent within six years or returned to the current owner of the property); FORT WORTH, TEX., REV. ORDINANCES ch. 30, art. VIII, § 30-193 (2012) (effective May 13, 2008) ("Upon application, any transportation impact fee or portion thereof . . . which has not been expended within the service area within ten (10) years from the date of payment, shall be refunded to the record owner of the property for which the impact fee was paid . . ."). In certain instances, California law requires local governments to identify the approximate date by which the construction of the relevant public improvement will commence. See CAL. GOVT. CODE § 66006(b)(1)(F) (West 2009).

¹⁹⁷Hawaii's model bears some analogy to recent case law in other jurisdictions suggesting that the government must put outwardly condemned property to public use within a specified period. See, e.g., *S. Portland Assocs. v. City of South Portland*, 746 A.2d 365 (Me. 2000).

goal of these expiration periods apparently is to assure that the government's ability to take property—either outright or as part of an exchange for a development permit that otherwise could have been denied—is not used simply as a revenue-raising device for not-yet-determined purposes.¹⁹⁸ In other words, the Hawaii legislature seemingly believes that exacting temporally constrained present interests presumably serves to more closely tailor permit conditions to meet actual project impacts.

Theoretically, exacting future interests can produce the same result. Unlike the Hawaii example, though, the *applicant* in the model offered here retains the present interest—in a defeasible fee—while the state holds the contingent future interest.¹⁹⁹ For instance, to return to the hypothetical offered above in Part II involving Branch Durant, the city might require the conferral of a future interest in the roadway dedication that is triggered if and when (1) the assembly of all necessary lots is complete and (2) the roadway expansion becomes a public necessity and a fiscal reality.²⁰⁰ Likewise, the city might demand a future interest in the shore protection dedication²⁰¹ that is triggered if and when sea-level rises to a particular elevation above a pre-determined, community-wide reference point.²⁰²

¹⁹⁸See, e.g., David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 358 (2007).

¹⁹⁹This approach bears analogy to waivers of remonstrance to the formation of local improvement districts. In effect, a landowner might receive development approval on the condition that he waive his ability to object to any future creation of a local improvement district, such that when that local improvement district is created, the permittee would be required to pay into it without challenge. See Sullivan, *supra* note 106, at 33 (explaining Oregon's policy of allowing the imposition of assessments under local improvement districts). It is distinct, however, from "recapture agreements," where a developer is required to advance the full costs of a public improvement up front, on the condition that those costs will subsequently be apportioned among the various properties that benefit from them and the original payor refunded the appropriate amount with interest. See Smith, *supra* note 18, at 9.

²⁰⁰Tailoring of the triggering conditions would need to be done with care in order to minimize the possibility of the parties later having a difference of opinion as to whether a particular triggering event actually occurred.

²⁰¹Some scholars suggest that the public trust doctrine already affords a non-contingent future interest in all dry land that will be inundated by sea-level rise. See Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L. J. 51 (2011). See also Andrew C. Sifton & Jessica Grannis, *Stemming the Tide: How Local Governments Can Manage Rising Flood Risks*, GEORGETOWN CLIMATE CENTER, 19–20, 23 (April 2010), www.law.unc.edu/documents/clear/vacastudy.pdf; Titus, *supra* note 59, at 738. This position—which, if adopted, could alleviate the need to exact a

There are detriments to such an approach, several of which are outlined in Section B below. However, exacting future interests does at least partially respond to landowners' practical concerns regarding assembly and forecasting uncertainty that dedications exacted for the future initially generate. In addition, exacting future interests might soften any economic blow that conceivably could trigger the filing of an exaction takings claim in the first place. Each of these points—assembly, uncertainty, and costs—is addressed briefly in turn below.²⁰³

1. Land Assembly

From the developer's perspective, any uncertainty regarding land assembly would be eliminated. The developer's current use of the strip of land presumably would not be impaired by anything other than the common law doctrine of waste.²⁰⁴ Any current use of that strip would only come with the *risk* that he may need to abandon that use upon the triggering events.²⁰⁵ Only if and when the triggering events occur would the developer be charged with removing any structures or otherwise preparing the land for the state's possession.²⁰⁶

future interest in the context of sea-level rise—could require (in at least some, if not all, jurisdictions) a dramatic alteration of the common law public trust doctrine and the doctrine of waste.

²⁰² The *community-wide* nature of the reference point would make individual efforts to hold back the sea in front of one's property—e.g., through the erection of a lot-wide sea wall or other obstruction—largely irrelevant. The government arguably can wait to implement some shore protection measures until the sea rises to a particular elevation, though other measures will be more productive if implemented immediately. The exacted future interests discussed in this Part necessarily, then, refer only to the former. Presumably, these exacted future interests could be employed in pursuit of a more ecological approach to sea-level rise than that suggested in the Branch Durant hypothetical by simply allowing natural landward migration of the high water line. See Titus, *Rolling Easements*, *supra* note 194.

²⁰³ In addition to the advantages outlined in the sub-sections that follow, an additional benefit of this alternative approach to exaction imposition is its ease of implementation, for local governments presumably can experiment with temporal segmentation in the exaction context without the conferral of any additional authority from the state or federal level. See, e.g., Poirier, *supra* note 56, at 106 ("Cities . . . sometimes indeed do serve as laboratories of policy experimentation.").

²⁰⁴ For a discussion of the doctrine of waste, see *infra* Part IV.B.1.

²⁰⁵ Again, in the Branch Durant hypothetical, these triggering events would include the state's proceeding with needed roadway expansion following the assembly of all necessary lots or the rise in sea-level to a pre-determined elevation. See *supra* notes 200–202 and accompanying text.

²⁰⁶ Local governments might consider demanding a lien on the whole property to provide

2. Forecasting Uncertainty

Landowners challenging exactions for the future are undoubtedly concerned that present dedications impose an inordinate personal burden—by preventing far too much development—for public benefits that are tied to projections that are inherently uncertain.²⁰⁷ Exacting future interests, however, minimizes such risk.²⁰⁸ The importance of whether the landowner and the government agree on the baseline—e.g., on the accuracy of the state's forecast about development or natural hazards in a given region—is diminished when the state exacts only a contingent future interest.²⁰⁹ If the forecasted development or natural hazards never do in fact come close to triggering the state's future interest, such exactions only minimally burden landowners.

Still, to further minimize the effects of forecasting uncertainty, it is conceivable that landowners might advocate for the creation of an additional layer of temporality: a time period within which the state's future interest must become possessory or fail.²¹⁰ If indeed a temporal

protection against landowners who are economically unable or unwilling to prepare the land for the state's possession upon the happening of the triggering events.

²⁰⁷ See *supra* Part III.A.4. As one commentator critical of local governments exacting present dedications for the future explained, "the development of land has become a system for accumulating a municipal kitty." See Smith, *supra* note 18, at 28.

²⁰⁸ This risk minimization can be analogized to amortization schemes that phase out non-conforming uses. See, e.g., *Oswalt v. Cnty. of Ramsey*, 371 N.W.2d 241, 246 (Minn. Ct. App. 1985) (declaring that a municipality can phase out non-conforming uses over a "reasonable" period of years without paying compensation); Titus, *Rising Seas*, *supra* note 194, at 1350 ("Although a policy that required land to be abandoned fifty years hence would often allow no productive use when the deadline finally arrived, it would have a trivial impact on the current value of the parcel.").

²⁰⁹ A municipality's confidence that anticipated future development or other events will occur is necessarily a complicated, subjective inquiry based on a variety of economic, scientific, and other factors. And, of course, whether anticipated future development or other events actually occur is provable only in hindsight. To allay property owners' fears of unbridled projections (and—potentially, at least—simultaneously to improve government's effectiveness), it may be worthwhile to consider a formalized follow-up review process to assess the accuracy of (1) predictions made in the course of individual permitting decisions regarding projected development and other anticipated events, and (2) the projected benefits of the mitigation measures reflected in imposed exactions.

²¹⁰ The California Coastal Commission has experimented with imposing such a time period. See, e.g., *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 385 (9th Cir. 2002) (discussing an exacted offer to dedicate a public access way, which would expire if the state did not accept that offer within a period of twenty-five years). In certain jurisdictions, the rule against perpetuities

limitation is placed on the government's future interest, it may be possible to institute a presumption whereby, upon that pre-designated date, the state's future interest terminates if the state fails to rebut that presumption. For instance, the state arguably could rebut this presumption on the pre-designated date if it proves that it has collected a significant number—though not all—of the lots necessary to expand a given roadway, development in the area is increasing (if at a slower rate than originally forecast), and the roadway expansion is part of an approved capital improvements plan. Under this model, a successful rebuttal would result in an extension of the time period within which the state's future interest can become possessory.²¹¹

3. Costs

Consideration of the percentage reduction in the relevant property's market value due to an exaction is, as noted above, mysteriously absent under the *Nollan* and *Dolan* exaction takings model, despite its prominence in nearly all other areas of takings law.²¹² However, the existence and extent of the economic impact on a landowner resulting from an exaction likely plays into the landowner's calculus of whether to challenge an exaction in the first place.²¹³ With the state exacting only a future interest, the landowner would be allowed to use the strip of land up until the point in time when the triggering events occur and the state takes possession.²¹⁴

might mandate an expiration period.

²¹¹ Alternatively, if a "hard" time limitation is placed on the state's future interest, there may be certain instances when, at the point it must "return" the future interest, the state should have the ability to impose an alternate condition. If, for instance, the developer's project does in fact contribute to traffic problems, but, within the temporal confines of its future interest, the state is unable to acquire the necessary parcels to widen the street, it could be appropriate for the state at that point to impose an alternative condition to alleviate the traffic, e.g., requiring the landowner to fund a stoplight, yield sign, crossing guard, etc.

²¹² See *infra* notes 167, 185 and accompanying text.

²¹³ This would appear to be particularly true if compensation were considered the exclusive remedy in takings litigation. In *Lingle*, the U.S. Supreme Court seemingly resolved that injunctive relief generally is inappropriate in takings cases. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 544 (2005). However, whether a successful exaction takings claim offers a remedy other than compensation remains unclear.

²¹⁴ See Titus, *Rising Seas*, *supra* note 194, at 1285 (making a similar claim with respect to "rolling" easements). If the state fails to assert its interest upon the happening of the triggering events, it is conceivable that in select jurisdictions the landowner ultimately may be able to gain title to what is now the state's strip of land through adverse possession. At English common law,

Landowners likely would self-amortize this strip of land based on their own projections as to when the triggering events will occur.²¹⁵ The government's exacting a future interest may encourage the landowner to strategically depreciate the strip, say, by limiting the use of it to a parking lot, landscaping, mobile food carts, etc.²¹⁶ Still, the developer would have the ability to reap some economic return from this strip of land, which he would not have been able to do had the state required an immediate dedication. Moreover, a risk-taking landowner may make major capital expenditures in the hopes that the triggering event never occurs or that the government's interest otherwise never will be enforced.²¹⁷ In this way, the state's exacting a future interest will impose a lesser economic burden on a landowner than the state's exacting a present interest in fee.²¹⁸ That is, the

the maxim *nullus tempus occurrit regi* (time does not run against the king) barred adverse possession against the government. American courts often have relied on this principle, as well as state constitutional provisions that restrict the alienation of land held in the public trust, to prohibit the adverse possession of public property. However, select states permit adverse possession against state property interests on the same terms that they permit adverse possession against private interests. See, e.g., Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939 (1996).

²¹⁵ See Sax, *supra* note 194, at 151. Some developers, however, may dislike the lingering uncertainty underlying their own projections on when the triggering events might occur. For some, finality may be more desirable than waiting for later events or a future termination date, even where the former could prove significantly more expensive than the latter in hindsight.

²¹⁶ The landowner may do so for several reasons, including the fact that selling—or even renting—the strip with such a limitation attached could (1) be difficult, and (2) lead to complicated valuation problems should that new owner make significant improvements to the land prior to the triggering event or grow psychologically attached to the land. See Titus, *Rising Seas*, *supra* note 194, at 1326.

²¹⁷ Regarding enforcement of the government's interest upon the happening of the stated events, see *infra* Part IV.B.2. There also exists the possibility of mischief, whereby landowners could covertly negotiate with other landowners in some instances to strategically, if artificially, delay or avoid the occurrence of the stated triggering events.

²¹⁸ James Titus has suggested that the government could purchase “rolling” easements along coastlines—i.e., easements that move with the rise and fall of the sea—now at a fraction of the cost that the state would incur if it waited until the sea actually rose to a specific level. Titus, *Rising Seas*, *supra* note 194, at 1313. Exacted future interests are similar to Titus's approach in this way: developer's use of a high discount rate makes the approach more, not less, feasible. See *id.* at 1331 n.180. In many other contexts—particularly in the context of environmental policy—where regulation is intended to produce public benefits over multiple decades, regulated parties advocate for a high discount rate that will produce economic figures that will discourage regulation. It is possible that regulated landowners could, in an effort to increase the amount of takings compensation at stake, reverse course when faced with an exacted future interest by asserting that, say, the road widening project or sea-level rise is more likely to happen sooner than

present value of the exacted future interest would be discounted by the rate of return the landowner could reap for the strip of land, compounded over the number of years likely to pass before the state's interest is triggered.²¹⁹

B. Disadvantages of Temporal Segmentation in the Exactions Realm

The prior section suggests that exacting future interests is at least partially responsive to the concerns landowners raise in situations where the state exacts present dedications for the future. However, exacting future interests may come with several possible disadvantages from the perspective of those members of the public who allegedly are protected from the impacts of development via exactions. These disadvantages include issues surrounding spoliation of the property and political incentives against “enforcement” of the state's future interest upon the happening of the stated events. These disadvantages are addressed in turn below.

1. Spoliation

Holding only a future interest, the state does not have the ability to actively manage and maintain the strip of land in a coordinated manner with any other collected strips.²²⁰ There is a risk, then, that the present interest

the government predicts, though such a claim could deter potential buyers. *Id.* at 1331 n.181. In general, settling on the appropriate discount rate to apply in evaluating decisions surrounding land uses admittedly is often quite difficult and contentious.

²¹⁹ A similar phenomenon is evident when comparing two famous takings cases involving subsurface mining. The foundational, if cryptic, regulatory takings case of *Pennsylvania Coal Co. v. Mahon* involved Pennsylvania's Kohler Act that prohibited mining activities when such activities threatened homes with subsidence. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412–413 (1922). The U.S. Supreme Court declared that the Kohler Act immediately destroyed the subsurface estate held by the plaintiff, the Pennsylvania Coal Company, which sat below residences currently at risk of subsiding. *See id.* at 412–16. Yet sixty years later, the Court found that Pennsylvania's Bituminous Mine and Land Conservation Act—which also sought to minimize the risk of subsidence by limiting the amount of coal that could be mined—did not amount to a regulatory taking because mining could continue *until* subsidence became a threat. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498–501 (1987). That some ability to mine remained proved material, though that ability grew only out of the legislature's preemptive approach to a public safety problem that would inevitably arise in the future.

²²⁰ *See, e.g.,* Byrne & Grannis, *supra* note 3, at 21. Dissenting in *Dolan*, Justice Stevens pondered whether the state's requiring a dedication rather than a lesser interest—an easement—would be *better* for the landowner for several reasons. *Dolan v. City of Tigard*, 512 U.S. 374, 404 (1994) (Stevens, J., dissenting). In short, upon a dedication to the state of the strip of land on

holder could spoil the property. The doctrine of waste affords future interest holders only limited protection against activities by the present interest holder that harm the future interest.²²¹ The sooner and more likely the future interest is to vest in possession, the greater protections the doctrine provides.²²² Yet determining the likelihood and timing of the government's interest becoming possessory reignites the same type of forecasting uncertainties that precipitated takings jurisprudence's disfavor of exactions for the future to begin with.²²³ And even if the government could prove that the landowner was liable for waste—say, a permittee so mined the subsurface of the relevant strip of land to the point where the surface could no longer be used for a road when the state's interest came due—the government would have expended considerable time in litigation, and it is not clear what its remedy might be.²²⁴

It may be possible to compose reasonable use limitations aimed at assuring the relevant segment of land will remain suitable for future conversion to the state's designated use.²²⁵ However, these limitations could increase the upfront economic burden on the landowner, thereby

which she was prohibited from building in the first place, Dolan would not bear the costs associated with maintenance, property taxes, or tort liability. *Id.* While the landowner would continue to bear the costs associated with maintenance, property taxes, or tort liability under the proposal herein, those costs likely would be more than offset by the ability to put the strip of land to an economic use for the period preceding the triggering events.

²²¹ Where, as here, the possessory estate is a defeasible fee, the future interest holder ordinarily cannot obtain relief at law under the doctrine of waste for conduct that, if engaged in by the holder of a possessory estate that will end naturally (e.g., a life estate or a term of years), would trigger liability. See WILLIAM B. STOEUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 160 (3d. ed. 2000). However, relief in equity may be available to the holder of an executory interest, possibility of reverter, or right of re-entry "as against the owner of a present defeasible fee simple estate, provided the latter has committed 'wanton,' 'unconscionable,' or 'malicious' acts which [sic] reduce the value of the fee simple, and provided that there is a reasonable probability that the plaintiff's future interest will become possessory." *Id.* at 163. See also Olin L. Browder, Jr., *Defeasible Fee Estates in Oklahoma—An Addendum*, 6 OKLA. L. REV. 482, 484 (1953).

²²² See Stoeuck, *supra* note 221, at 160.

²²³ See *supra* Part II.C., III.A.4.

²²⁴ Absent technology to re-stabilize the surface, there seemingly is no remedy that could allow for the government to expand the road in the location in which it had planned to do so.

²²⁵ In the Branch Durant hypothetical offered above in Part II, the focus of these limitations would be to prohibit interference with either road widening or shore protection measures even after all structures on the property have been razed.

debasement a key distinction between exacted future interests and exacted dedications in fee.²²⁶

2. “Enforcing” the Future Interest

Arguably more disconcerting than the spoliation issue described above, there is a possibility that the state will not enforce its future interest once the triggering events occur. This possibility is not insignificant, in light of the difficult political decision of requiring the removal of parking lots, landscaping, structures, or even workers and residents from the relevant strip of land at the point in time when the state’s interest comes due.²²⁷

When one private party holds the present interest in a given estate and another the future interest,²²⁸ the future interest holder likely will evict the present interest holder should that present interest holder remain on the property after his estate’s natural end. Yet from the landowner’s perspective in the context of exacted future interests, his or her benefit of the “bargain”—the conditional permit—could, by the time of the triggering events, have faded into the past.²²⁹ Therefore, the government’s enforcing its future interest could be viewed—though erroneously—as imposing a “new” uncompensated loss.²³⁰ Distinct from a private party holding a

²²⁶ See *supra* notes 212–219 and accompanying text.

²²⁷ See, e.g., Titus, *Rising Seas*, *supra* note 194, at 1331 (explaining, in the context of tidelands protection policy, the risk of “backsliding,” where those with “narrow interests who gambled and lost are able to persuade policy makers” to repeal the policy and “bail them out”); Sax, *supra* note 194, at 148 (explaining the prospect of landowners “gamb[ing] on the rules of the game changing”). In the context of outright condemnation of a waterfront easement to allow for natural migration of wetlands, Sax advocates for the government’s conferral of an “insurance policy with a present value equal to the present value of the easement” to “decrease[] public sympathy” for the landowner. *Id.* at 157, 159. Under Sax’s model, the landowner would receive the proceeds of the purchase price—invested and compounded over time—only upon the sea’s rising to a particular elevation. *Id.* at 154. This thought-provoking approach is not applicable in the context of exactions where the “payment” is the front-end conferral of the conditional permit.

²²⁸ For example, private landowner A might hold a reversion that follows private tenant B’s one-year leasehold.

²²⁹ Landowners might be said to suffer from “availability bias” at the time they receive the permit, for losses will only occur—if they occur at all—years hence. See, e.g., Dana, *supra* note 63, at 1325.

²³⁰ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992) (concluding that the government may “exercise” its regulatory authority to mirror pre-existing, common law limitations on title without implicating the Takings Clause); *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 385 (9th Cir. 2002) (rejecting a landowner’s claim that the state’s exercise of an

similar interest, the government presumably cares about the immediate economic plight of its constituents—politically or altruistically—such that it may be willing to subordinate its position as the future interest holder.²³¹

C. Summarizing the Concept of Temporal Segmentation in the Context of Exactions

The above proposal offers the conceptual idea of incorporating temporally severed property interests into the realm of land use exactions. In some instances, it may offer local governments an alternative to the

option for a public access easement exacted from the landowner's predecessor in interest constituted a compensable taking); *United States v. 30.54 Acres of Land*, 90 F.3d 790, 792 (3d Cir. 1996) ("Because the navigational servitude was a preexisting limitation on the landowners' title to riparian land, we hold the Corps' exercise of the servitude . . . was not a taking . . ."). In the context of an exacted future interest, a landowner might get comfortable with the status quo—its present possessory use of the relevant strip of land—such that it may be difficult to frame the state's enforcement of its interest on that strip of land as anything other than a loss. Indeed, a landowner, whether deliberately or out of inertia, could engage in absolutely no self-amortization of the strip of land, such that, in light of the significance of the landowner's (now partially self-created) "loss" upon the triggering event, the government might be *more* encouraged to waive its interest. Sax, *supra* note 194, at 151–52 ("The paradox here is that, from the point of view of the landowners . . . the worse things get the better they are."). This complication bears relation to the general claim that the Takings Clause's requiring the government to pay market value incentivizes property owners to "overinvest in buildings that they know have a significant chance of being destroyed by subsequent government projects." See Poirier, *supra* note 37, at 263 n.56. The incentive here, however, is not the payment of compensation but rather the possibility that the state will not enforce the interest that it already "paid for" through issuance of a conditional permit. In this sense, further consideration of exacting future interests may benefit from analogy to the principle of regret—the extent to which the law allows contracting parties to change their minds. See, e.g., E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (2000).

²³¹ See Sax, *supra* note 194, at 150, 155; Peloso & Caldwell, *supra* note 201, at 70. Had the state originally exacted a present dedication, it is far less likely that the state would "return" that possessory interest upon the happening of the triggering events than it would be to subordinate its claim upon the happening of those same events where it originally had exacted only a future interest. Behavioral economists might call this a form of "divestiture aversion," for the state as holder of an existing possessory interest is less likely to part with that possessory interest than it would be to "pay"—politically—to enforce its future interest under otherwise identical circumstances. See, e.g., Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 203 (2006). The state's willingness to subordinate its future interest may be particularly strong in instances where the future, intended public use of the property is for open space or a natural area. In implementing a model of this sort, then, it may be important to distinguish between land that will be used for roads or other improvements, and land that, from the triggering event forward, will not be disturbed.

common, constitutionally perilous practice of exacting present interests in a way that serves both public and private objectives. This approach might be useful, as noted herein, in the context of responding to development impacts that are not anticipated to occur until some point further off into the future. However, it is conceivable that such temporal segmentation also could be useful in some instances where even traditional exactions responding to near-term harms have been declared unconstitutional.²³²

V. CONCLUSION

New development commonly contributes to projected infrastructural demands caused by multiple parties or amplifies the impacts of anticipated natural hazards. At times, these impacts only can be addressed through coordinated actions over a lengthy period. In theory, the ability of local governments to attach conditions, or “exactions,” to discretionary land use permits can serve as one tool to accomplish this end. However, exaction takings law’s narrow focus on demonstrably measurable, immediate development impacts can impede communities’ efforts to prepare for such future contingencies. Unlike traditional exactions that respond to immediate development harms, “exactions for the future”—those exactions responsive to cumulative anticipated future harms—admittedly can present land assembly concerns and involve inherently uncertain long-range government forecasting. Yet it is not clear these practical impediments are sufficient to warrant the near categorical prohibition on such exactions that is imposed by current Takings Clause jurisprudence.

This article first highlights landowners’ practical concerns surrounding land assembly and forecasting uncertainty that can pose difficulties for local governments considering the implementation of exactions for the future. From there, it explores two rather peculiar features of the U.S. Supreme Court’s exaction takings jurisprudence that presumably flow from these practical concerns—namely, an aversion to planning and a reversion to a probing form of substantive judicial review—that expose a near categorical rule against exactions that seek to address future harms. That these features denote a significant break from other major areas of takings jurisprudence

²³²In *Nollan*, for instance, tasking the applicant with conferring to the public a right to traverse across or otherwise use a segment of the applicant’s beach property within a short, specified time period on either side of high tide would have a significantly lesser impact on the applicant than an outright dedication. Of course, this modification does not necessarily solve the nexus question. See *supra* notes 41–46 and accompanying text.

might suggest that exaction takings law is due for a marked adjustment. However, assuming the judicial predilection against exactions for the future will remain in place prospectively, this article suggests that local governments might consider an alternative approach to conditioning development permits.

The alternative approach set forth in this article involves temporally partitioning property interests at the outset to allow for the exaction of future interests, as opposed to the commonly exacted present dedications or easements. Segmenting, across time, the government's sought-after interest could open the door for reasonable implementation of exactions aimed at anticipated harms presented by phenomena such as population rise and climate change, which threaten to place new stresses on public infrastructure and the environment. This approach at least partially responds to the practical concerns and jurisprudential complications that exactions for the future initially spark. Admittedly, however, it also comes with the potential detriments of landowner spoliation of the state's future interest and inadequate enforcement due to proximate political or other considerations. While any particular details of the alternative approach to exaction imposition offered herein are only suggestive, the above observations on the advantages and disadvantages of temporally segmenting property interests in the exactions context hopefully present fodder for prospective elaboration and discussion.